88-730

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FOREST HILLS EARLY LEARNING CENTER, INC.,
ACADEMY DAY CARE, INC., AND
HOLLOMAN CHILD CARE CENTERS, INC.,
Petitioners,

v.

LARRY D. JACKSON, AS DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE COMMONWEALTH OF VIRGINIA,

and

GRACE BAPTIST CHURCH, *et al.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Is a state's decision to exempt church-run child care centers from child care licensing standards that concern matters such as ventilation, heat, cots, nutrition and space per child based on the objection of some churches to any licensing of their child care activities immune from judicial scrutiny under the Establishment Clause to determine whether the exemption alleviates a significant burden on the ability of such centers to define and carry out their religious missions?

PARTIES

Petitioners Forest Hills Early Learning Center, Inc., Academy Day Care, Inc., and Holloman Child Care Centers, Inc., plaintiffs below, are two non-profit and one for-profit licensed child care centers without religious affiliation. None of the petitioners has a parent company, subsidiary, or affiliate.

Respondent Larry D. Jackson, defendant below, is Director of the Department of Social Services of the Commonwealth of Virginia. Respondents Grace Baptist Church, Tabernacle Baptist Church, Berean Baptist Church and the Rock Church are four exempt church-run child care centers who intervened on behalf of a class of exempt church centers in support of the state.

Shenandoah Baptist Church and its pastor Robert L. Alderman opted out of the class of exempt centers and were dismissed from the case. They are not parties to this proceeding.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Forest Hills Early Learning Center, Inc., Academy Day Care, Inc., and Holloman Child Care Centers, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on May 6, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 846 F.2d 260 (4th Cir. 1988) (*"Forest Hills IV"*), and is reprinted in Appendix A to this Petition (App. 1a). The Fourth Circuit's

denial of the petition for rehearing and suggestion for rehearing in banc is reprinted in Appendix E (App. 149a). The district court's final order dismissing the case is reprinted in Appendix D (App. 148a). The opinion of the United States District Court for the Eastern District of Virginia is reported at 661 F. Supp. 300 (E.D. Va. 1987), and is reprinted in Appendix B (App. 10a). An earlier opinion of the Fourth Circuit, vacating summary judgment for defendant and remanding for further proceedings is reported at 728 F.2d 230 (4th Cir. 1984) (*"Forest Hills II"*). This opinion is reprinted in Appendix C (App. 116a).[1]

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1988. The petition for rehearing and suggestion for rehearing in banc of petitioners was denied on August 3, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution Amendment I provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

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[1] The other reported opinions in this case are, in chronological order, the opinion of the district court granting defendant's motion to dismiss, found at 487 F. Supp. 1378 (E.D. Va. 1980); the district court's opinion on cross-motions for summary judgment, published at 540 F. Supp. 1046 (E.D. Va. 1982); and the opinion of the court of appeals remanding the case for further proceedings, published at 789 F.2d 295 (4th Cir. 1986). The unpublished opinion of the Fourth Circuit, *Forest Hills Early Learning Center, Inc. v. Lukhard*, No. 80-1272 (4th Cir. Jan. 9, 1981) and the judgment of the district court denying class certification and granting summary judgment for plaintiffs, *Forest Hills Early Learning Center, Inc. v. Lukhard*, No. 80-0116-R (E.D. Va. Jan. 17, 1985), have been lodged with the Clerk of the Supreme Court of the United States.

STATUTE INVOLVED

Virginia Code Section 63.1-196.3 is set forth in Appendix F (App. 151a).

REGULATIONS INVOLVED

The Minimum Standards for Licensed Child Care Centers, effective April 1, 1986, 2:4 Va.R. 417-462 November 25, 1985, are set forth as an appendix to the district court's opinion reported at 661 F. Supp. 330 (E.D. Va. 1987), and are reprinted at Appendix B (App. 42a).

STATEMENT OF THE CASE

This case raises a critical question under the First Amendment of the United States Constitution, as yet not squarely addressed by the Court. That question is whether an exemption that relieves church-run child care centers from compliance with the religiously neutral health, safety and welfare standards applicable to non-exempt centers constitutes an impermissible establishment of religion.

Since at least 1948, the Commonwealth of Virginia (the "state") has required that child care centers comply with licensing standards. From 1968 to 1979, all child care centers were subject to the licensing requirements of Va. Code §§ 63.1-195 through 63.1-219 and applicable standards promulgated pursuant thereto. Faced with a rapidly growing number of child care centers and an increasing number of complaints from parents concerning inadequate facilities and care at many centers, the Virginia Department of Welfare (now the Department of Social Services) undertook a review of its licensing standards during the early 1970's. It found that many centers were more concerned with maintaining competitive prices and financial stability than with protecting the best interests of children in their care. In order to protect children

by ensuring a safe and healthy environment in centers, the Department of Welfare promulgated new minimum child care standards for licensed centers in 1976. These standards, as revised in 1986, are reprinted in Appendix B (App. 42a). The licensing standards address such areas as ventilation, heat, light, nutrition, cots, health, safety, space per child, child/staff ratios, administrative structure, staff qualifications, recordkeeping, financial capacity and disciplinary practices.

The Division of Licensing of the Department of Social Services must issue a license when it determines that a child care center meets substantially the standards adopted by the State Board of Social Services and any additional requirements that may be specified by the Virginia Code. The Division, however, may grant a variance from the minimum standards in two instances: (a) when compliance with a particular minimum standard poses a hardship for a center and an alternative method of compliance would satisfy the intent of the standard; or (b) when the actual suspension of the standard would not endanger the safety or well-being of the children and would not create a violation of statutes or the requirements of another regulatory agency. The Division of Licensing considers religious beliefs to be an important factor in granting variances. Thus, a variance is available should a church center object to specific standards on free exercise grounds.

A year after the 1976 licensing standards were adopted, a few licensed church centers, including respondents Tabernacle Baptist Church and Berean Baptist Church, raised religious objections to licensing *per se* for the first time. These objections prompted the Attorney General of Virginia to investigate the issue. The Attorney General "found no instance of an impact on religious belief and practice such as to negate these regulations of

general application" and concluded that the child care standards "do not violate First Amendment rights and are enforceable against centers operated by religious institutions." Opinions of the Attorney General 507, 509 (1977-78), cited in *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 243 n.14 (4th Cir. 1984) (*"Forest Hills II"*) (App. 139a).

The objecting churches subsequently took their complaints against licensing to the Virginia legislature. In 1979, Virginia enacted Va. Code § 63.1-196.3 (the "exemption statute") exempting all "[c]hild care center[s] operated or conducted under the auspices of . . . religious institutions" from compliance with the licensing requirements of the Virginia Code. Under the exemption statute, religiously affiliated child care centers that elect exempt status are relieved from complying with virtually all of the minimum child care standards, which were previously applicable to all child care centers.[2]

In contrast to the comprehensive health, safety and welfare standards protecting children in non-exempt centers, the exemption statute sets only minimal standards. Instead of obtaining a license, a religiously affiliated child care center wishing to operate an exempt center merely needs to

1. file with the Commissioner of Welfare an initial statement of intent to operate a child care center;
2. file an annual statement of intent to operate an exempt child care center;

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[2] Many church-run child care centers have chosen to obtain licenses, rather than take advantage of the exemption. Among the 215 centers that could obtain exempt status, at least 106 centers have elected to operate with licenses. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 661 F. Supp. 300, 309 (E.D. Va. 1987) (App. 25a).

3. certify that staff qualifications have been disclosed to parents or guardians of enrolled children;
4. present documentation of tax-exempt status, compliance with local health and fire ordinances; and
5. make public disclosure of certain aspects of the operations.

Va. Code § 63.1-196.3.A.

The exemption statute provides the state with limited methods of enforcing these minimal standards. If an exempt center does not file a statement of intent, the Commissioner may take appropriate action, including filing suit to enjoin the operation of the center. Va. Code § 63.1-196.3.B. A local welfare, health or fire department may inspect an exempt center and take appropriate action only if a parent or guardian complains to the local agency. *Id.* at § 63.1-196.3.C. In contrast, in the case of non-exempt centers, the state enforces compliance with the minimum child care standards through state inspection and administrative procedures.

Thus, the exemption statute relieves religiously affiliated centers from compliance with standards enforceable by state agency inspection and legal sanctions in the "critical areas of licensing itself, and of program, insurance, financial resources and management, staff qualifications, and internal administration following licensing . . . ." *Forest Hills II*, 728 F.2d at 236 (App. 124a). Under the exemption statute, church-run centers are exempt from standards relating to nutrition, space, heat, light, ventilation and physical safety.

Plaintiffs are three licensed child care centers without religious affiliation operating in Virginia. On February 1, 1980, they brought an action against William L. Lukhard, Director of the Department of Welfare,[3] challeng-

[3] In 1987, Larry D. Jackson, as Director of the Department of Social Services of the Commonwealth of Virginia, was substituted for William L. Lukhard.

ing the constitutionality of Va. Code § 63.1-196.3 as, *inter alia*, an establishment of religion and a denial of the equal protection of the laws. Jurisdiction in the district court was based on 28 U.S.C. § 1343. The state defended the exemption as a permissible accommodation of the potential free exercise rights of some church-run child care centers, despite the Attorney General's finding that the regulations posed no such concern.

On February 7, 1984, the court of appeals vacated an order of the district court upholding the validity of the exemption statute. *Forest Hills II*, 728 F.2d at 247 (App. 146a). It found that "[t]he exemption, on its face, and as a matter of law was overbroad in relation to the secular legislative purpose claimed for it," which was the accommodation of potential free exercise rights. *Id.* at 244 (App. 140a). The court, however, remanded for the limited purpose of allowing church-run centers an opportunity to intervene as a class to demonstrate that the application of specific child care standards to their centers would infringe on their free exercise of specific religious beliefs. *Id.* at 246 (App. 143a-144a).

Respondents Grace Baptist Church, Tabernacle Baptist Church, Berean Baptist Church and the Rock Church moved to intervene on behalf of a class of all exempt centers, and a class was subsequently certified. At trial on March 9, 1987, the church-run centers acknowledged that the state has a compelling interest in protecting children. Representatives of the churches testified that virtually none of the standards would infringe on their religious beliefs and that they complied with most of the standards in any event.

The churches' central objection to the licensing requirements came down to the proposition that licensing in and of itself burdens their free exercise rights. This objection was largely founded on their fear that the state could arbitrarily deny licenses to church-run centers, even if they complied with all of the child care standards. The

district court rejected the argument that licensing to certify compliance with concededly unobjectionable standards would, in and of itself, burden free exercise rights. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 661 F. Supp. 300, 311 (E.D. Va. 1987) (App. 28a). Furthermore, as the district court found, the churches failed to show that application of particular exempt activities would impinge on the free exercise of their religious beliefs. *Id.* at 316 (App. 39a).

On appeal, the Fourth Circuit reversed the position it had taken in *Forest Hills II* and concluded that *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, —— U.S. ——, 107 S. Ct. 2862 (1987) ("*Amos*"), required it to uphold the constitutionality of the Virginia exemption statute. *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988) ("*Forest Hills IV*").

REASONS FOR GRANTING THE WRIT

A critical question that arises under the religion clauses of the First Amendment has to do with the competing tension between the two clauses. This case presents that question in stark terms.

To state the matter in simplified form: if a state (or the Congress) applies a safety regulation to a church that affects the church's religious activities or practices, the imposition of that burden may impair the church's free exercise of religion and violate that clause of the First Amendment. If, on the other hand, a state (or the Congress) relieves a church from compliance with safety standards applicable to all others, that act of exemption may "establish" a religion by favoring religion over nonreligion and may therefore violate the Establishment Clause. When both clauses are implicated by governmental action, courts must examine carefully the countervailing dictates of each clause to ensure that one clause does not override the other.

The need to prevent one clause from swallowing up the other is especially illustrated by this case. The critical question presented here is whether a court must uncritically accept a state's decision to exempt church-run centers from health and safety licensing standards that the churches find unobjectionable, because some churches object to the act of licensing itself.

In answering that question affirmatively, the court of appeals announced a new rule of religion clause law that drastically alters the delicate constitutional balance between the countervailing dictates of the religion clauses. The proponents of the exemption—the respondent churches—claim flatly that the act of licensing *any* of their activities, including the operation of a child care center, in and of itself, would violate the Free Exercise Clause because it would amount to a recognition that the state is superior in authority to Jesus Christ. Therefore, they assert that exempting them from regulations that pose no conceivable burden on religion is permissible under the Establishment Clause, even if it is not compelled by the Free Exercise Clause. The court of appeals accepted this position, something no other court has ever done.

This is a fundamental error with serious consequences. Churches and their employees and activities are subject to a wide variety of regulatory and licensing requirements designed to promote the health and safety of the people. A church may not be built on land that is not zoned for such a purpose in the absence of a specific exemption. A church employee may not operate an automobile on church business unless he or she possesses a state-issued operator's permit and unless the automobile is properly registered by the state. A church may not operate a cafeteria for its communicants unless the local health department approves the cafeteria. If a state may now exempt all of these activities from licensing and other health-and-safety regulations simply because some

churches want to be free of such regulation, the delicate balance between the two religion clauses will be severely distorted. Neither religion nor the health and safety of the people will be advanced by such a rule of constitutional law.

In propounding this new rule of religion clause law, the court of appeals purported to follow *Amos*. The court erred, however, by misperceiving the standard set in *Amos* and by ignoring significant facts that compel a quite different analysis and result here. First, the Court in *Amos* upheld an exemption permitting discrimination based on religious grounds because the exemption alleviated significant governmental interference in the ability of certain organizations to define and carry out their religious missions. *Amos* does not sanction all exemptions based on the mere assertion of free exercise concerns—rather, it requires that an actual burden on free exercise rights be alleviated before an exemption may be justified. The Fourth Circuit required no such showing.

Second, the significant differences in the purpose, scope and effect of the two exemptions demonstrate that the *Amos* standard should not be radically extended to permit a religious exemption from health and safety standards having no conceivable impact on free exercise rights. Although the exemption at issue in *Amos* was arguably broader than what may be constitutionally required by the Free Exercise Clause, it served to ensure that core free exercise rights requiring constitutional protection were in fact fully protected by the exemption. In contrast, the broad exemption at issue here does not serve to ensure the effectiveness of a narrower, constitutionally compelled exemption. No free exercise concerns are implicated by imposition of standards relating to such areas as the number of cots, heat, light, nutritious meals and minimum space per child in child care centers.

Thus, *Amos* provides no basis for the Fourth Circuit's decision to uphold the exemption from generally applicable

health, safety and welfare standards granted the church-run centers. Guidance from the Court to correct an unwarranted and novel ruling in this important and difficult area of constitutional law is necessary to ensure that the delicate balance between the countervailing prohibitions of the two religion clauses is not severely distorted.

I. Neither *Amos* nor other Supreme Court Precedent Justifies an Exemption that does not Alleviate Significant Governmental Interference with Religion.

At the outset, it bears emphasis that the central free exercise claim on which the Fourth Circuit justified the churches' exemption from child care standards is a narrow but radically new one: requiring churches to do anything more than simply assert that their free exercise rights would be burdened imposes a sufficient burden on religion, in and of itself, to warrant a general exemption from regulation and thereby foreclose any judicial inquiry concerning the validity of the churches' assertions.

No decision of this Court or any court, however, stands for the proposition that an exemption said to accommodate such a claim is permissible under the Establishment Clause absent any showing whatsoever that the standards to which the licensing applies actually burden religion. To read *Amos* as support for such a proposition is an unwarranted expansion of the case, which leads to the anomolous result of permitting the intervenor churches to determine the constitutionality of the exemption statute.

In *Amos*, a building engineer brought suit against a church for religious discrimination after he was fired from his job at a church-run, non-profit gymnasium for failing to qualify as a church member. The church defended its action under the exemption granted to religious organizations from the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, against discrimination on the basis of religion in employment connected with the organization's carrying on of its activities. 42 U.S.C. § 2000e-1.

At issue in *Amos*, as here, was the extent to which the government may go beyond what is mandated by the Free Exercise Clause to accommodate religion without violating the Establishment Clause. The Court analyzed the Establishment Clause challenge under the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the first prong of the *Lemon* test, a statute is unconstitutional if it lacks a secular purpose. The Court found that a valid, secular legislative purpose exists when Congress enacts an exemption "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, —— U.S. at ——, 107 S. Ct. at 2868. As Justice O'Connor emphasized in her concurrence, there must be "an identifiable burden *on the exercise of religion* that can be said to be lifted by the government action." *Amos*, —— U.S. at ——, 107 S. Ct. at 2874-75 (O'Connor, J., concurring) (emphasis in original).

The Court reached the same conclusion in *Wallace v. Jaffree*, 472 U.S. 38 (1985). There, the Court focused closely and at length on Alabama's "actual purpose" in enacting a voluntary prayer statute. The Court considered the state's claim that the statute served a secular purpose of accommodating free exercise rights. *Id.* at 57-58, n.45. In an opinion joined in by Justices Brennan, Marshall, Blackmun and Powell, Justice Stevens noted that the claims "seem to be based on the theory that the free exercise of religion of some of the state's citizens was burdened before the statute was enacted." Justice Stevens concluded that Alabama had not made a serious attempt to substantiate the claim of infringement of free exercise rights and therefore found that there was "no basis for the suggestion." *Id.*; *compare De La Salle Institute v. United States*, 195 F. Supp. 891 (N.D. Cal. 1961) (operation of church winery). *See also Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 (1985) ("It is virtually self-evident that the

Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program *actually burdens* the claimants' freedom to exercise religious rights") (emphasis added); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (judicial inquiry must go behind state's "avowed" secular purpose).

The standard set forth in *Amos* and *Jaffree* is precisely the standard that the Fourth Circuit correctly applied in *Forest Hills II*, but then abandoned in *Forest Hills IV* based on its erroneous reading of *Amos*. In *Forest Hills II*, the Fourth Circuit concluded that "[t]he [child care] exemption, on its face, and as a matter of law was overbroad in relation to the secular legislative purpose claimed for it." 728 F.2d at 244 (App. 140a). However, the Fourth Circuit concluded that it was necessary to determine whether and to what extent free exercise rights justifying the exemption existed before declaring the exemption invalid. *Id.* at 246 (App. 143a-145a). Thus, on remand the focus was to be on "the extent of any free exercise rights had by the sectarian institutions in the exempted activities, and the nature and extent of any compelling state interest in nevertheless regulating those activities." *Id.* (App. 144a-145a). The Fourth Circuit's directive in its 1984 decision was simply another way of stating the requirement enunciated in *Amos*: at a minimum, some burden must be placed on religious organizations in order to justify an exemption which is granted solely on the basis of religion under the Free Exercise Clause.

In *Forest Hills IV*, however, the Fourth Circuit reached quite the opposite conclusion. It held that churches should not be required to show that the application of the child care standards to their centers would result in some demonstrable, actual burden on their free exercise rights, thus immunizing the exemption from judicial scrutiny. 846 F.2d at 263 (App. 6a-7a). If the Fourth Circuit's most recent view were to apply, the Es-

tablishment Clause would be swallowed up under the guise of accommodating religion. As the Fourth Circuit had previously noted in rejecting just such a standard, "it cannot be the case that merely by asserting such a legislative purpose in litigation the state is entitled to have its legislature's accommodation to assumed free exercise rights confirmed by courts without any judicial inquiry into the validity of the assumption." *Forest Hills II*, 728 F.2d at 240 (App. 131a). Legislative action would be effectively immunized from meaningful, constitutional review if such a standard were employed. *Id.* (App. 131a-132a).

Moreover, assuming the existence of a burden on free exercise rights whenever asserted by a church would preclude examination of whether a compelling state regulatory purpose were ever countervailing. Under this view, the legislature could exempt all activities of religious institutions from all secular health and safety regulations as an accommodation of religion without ever running afoul of the Establishment Clause. But, as Justice O'Connor observed in *Wallace v. Jaffree*,

> [j]udicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause.

472 U.S. at 82. At some point, accommodation of religion becomes an unconstitutional establishment of religion by the state. *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987).

To insulate government action, particularly action that on its face treats religion differently from non-religion, from judicial scrutiny by the mere assertion of a free exercise concern would erode the protection of the Establishment Clause. The only way the courts can determine whether an accommodation has gone too far is to inquire into the validity of the asserted free exercise concern. Thus, an inquiry into the existence of free exercise rights

justifying the exemption was both proper and necessary under *Amos*. Only the existence of free exercise rights that would suffer in the absence of an exemption can justify an exemption from generally applicable health and safety standards. It was just such a requirement of demonstrating an actual burden on the churches' free exercise of their religion that the district court applied and the churches failed to meet on remand. *Forest Hills*, 661 F. Supp. 330. The failure of the Fourth Circuit to require the same showing is contrary to *Amos* and other First Amendment cases delineating the boundaries of the religion clauses.

II. In Contrast to the *Amos* Exemption, the Virginia Exemption Statute does not Alleviate any Governmental Burden on Religion.

In upholding the constitutionality of the Virginia exemption statute, the Fourth Circuit found that a burden on religion existed solely by requiring the churches to show that licensing of their child care centers would actually impose a burden on them. As discussed above, that standard is incorrect. The state and churches must show that the exemption relieves significant governmental interference with the ability of the churches to define and carry out their religious missions. An examination of the significant differences in the purpose and effect of the *Amos* exemption and the Virginia exemption, as well as an examination of the record in this case, shows why the churches were unable to demonstrate that licensing infringed on any of their free exercise rights.

The *Amos* exemption removes a significant burden on religion while the Virginia child care exemption does not. As the Court in *Amos* made clear, a state cannot prohibit a church from discriminating on grounds of religion in hiring a minister or other personnel engaged in religious activities. To that extent, an exemption from Title VII's prohibition against discrimination on the basis of

religion and employment, *see* Title VII, 42 U.S.C. § 2000e *et seq.*, would be required by the Free Exercise Clause.

The exemption went further by also exempting hiring for secular positions. The Court concluded that the broader exemption relieved a significant burden on religion. The Court observed that in the absence of the exemption, it would be exceedingly difficult to draw a line between secular and religious positions and that wherever the line was drawn, a church might be inhibited in hiring for what it felt were truly religious positions. An exemption limited to religious employment would be insufficient to protect free exercise rights because a church could not know in advance what positions would be deemed secular and thus subject to regulation. In addition, since a church's choice of employees for any position may involve religious considerations and affect its ability to carry out its religious mission, such uncertainty could easily burden its free exercise rights. As Justice Brennan observed, "[d]etermining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself." *Amos*, —— U.S. at ——, 107 S. Ct. at 2871 (Brennan, J., concurring). Accordingly, the Court ruled that Congress could go beyond what is constitutionally required by the Free Exercise Clause to exempt all church employment, whether those positions are properly characterized as religious or secular.

Thus, *Amos* stands for the proposition that a broader exemption from a regulation based expressly on a religious distinction is permissible when it ensures the achivement of a narrower, constitutionally compelled exemption. While *Amos* upheld the constitutionality of the exemption from the prohibition against religious discrimination in a religious organization's secular activities, the exemption is still narrowly focused: the exemption encompassing secular employees serves to ensure

that churches will experience no interference in hiring persons for what they consider to be religious positions and permits churches to define their community by employing only those who adhere to their beliefs. Moreover, the exemption applies only to religious discrimination in employment; churches remain subject to Title VII's prohibitions against discrimination in employment based on race and sex. On the other hand, *Amos* does not stand for the proposition that a broad exemption from religiously neutral health and safety regulations can be justified as a permissible accommodation of religion where no exemption at all is constitutionally required.

The exemption at issue in this case is thus distinct from the exemption at issue in *Amos* and cannot be justified on the grounds set forth in *Amos*. At trial the churches conceded that they have no free exercise objections whatsoever to all but a few of the standards. Indeed, they believe that they comply with most of the standards, and they would have no objection if the exemption statute required compliance with all such standards. Respondents Tabernacle and Berean could point to no instance during the period in which they were licensed where the state interfered with their ability to define and carry out their religious missions. The churches failed to show that application of any of the child care standards to their centers would burden their religion. The churches failed to show how, for example, a church center's decisions concerning minimum space per child, provision of cots and the provision of nutritious food in any way affect that church's ability to define and carry out its religious mission. As the Fourth Circuit had previously observed in *Forest Hills II*, standards governing these aspects of child care "are manifestly and properly concerned with the health, safety and welfare of the children" in child care and could not conceivably infringe on the free exercise of religion. 728 F.2d at 244 (App. 140a). These activities "fall completely outside the realm of protected 'religion' . . . ." *Id.* at 243-44 (App. 137a).

The minimum child care standards do not give the state the right to determine whether a church may operate a child care center as part of its ministry. The minimum child care standards do not affect the church-run centers' right to hire employees who share their religious views. The minimum child care standards do not affect the church-run centers' right to infuse their child care programs with a religious training and content of their choosing. Because the child care standards are religiously neutral, the exemption from these standards does not serve to avoid a direct conflict with religious belief. *See Gillette v. United States*, 401 U.S. 437 (1971).

On the other hand, the exemption statute removes the exempt centers from regulations setting minimum levels of health and safety, which were designed to ensure the well-being and safety of children in child care away from the home. The licensing requirements have the same purpose and effect as building, safety and sanitation codes which are applicable to church-run centers. The churches offer no principled distinction for their opposition to licensing requirements and their willing compliance with building and safety requirements.[4] The logic of the position of the Fourth Circuit and the churches leads to the inescapable conclusion that the state could, on free exercise grounds, exempt church-run centers from all safety and health requirements, including those found in building, fire and sanitation codes. Moreover, a church would have clear knowledge that these secular activities would

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[4] The churches' fear that the state could arbitrarily deny a license even if a center had complied with all regulations is unfounded. The state has not acted arbitrarily and unconstitutionally in the past, *Forest Hills*, 661 F. Supp. at 310 (App. 27a), and the fear that it might do so in the future is insufficient to justify a blanket exemption from health, safety and welfare standards. More importantly, the state may deny a license *only* if the applicant does not substantially meet the minimum standards or certain provisions of the Virginia Code. *Id.* (App. 28a) There are sufficient administrative and judicial safeguards to ensure that the licensing authority conforms to the laws. *Id.* at 310-11 (App. 28a).

be subject to regulation. Thus, there can be no concern that the regulation of such clearly non-religious activities could in any way inhibit or chill the free exercise of religious beliefs in any religious activities. In ruling to the contrary, the Fourth Circuit misconceived the import of *Amos* and incorrectly determined that the decision of the district court should be reversed.

The justification advanced by the Fourth Circuit—avoiding the unseemly clash of church and state—cannot support an exemption from regulations that do not in any way infringe on free exercise rights. *Forest Hills IV*, 846 F.2d at 263 (App. 6a). The question remains the existence of an actual burden on religious organizations. The incidental contact that occurs when generally applicable health and safety regulations are applied to churches is not a sufficient burden to justify an exemption. It is well established that a state may regulate the activities of religious organizations so long as it does not infringe upon the actual exercise or dissemination of religious beliefs. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Cox v. New Hampshire*, 312 U.S. 569 (1941). Concomitantly, a state cannot, under the guise of religious accommodation, exempt a religious institution from health or safety requirements that could not conceivably burden the expression of any religious belief.

The courts constantly struggle to balance the tensions between the two religious clauses of the First Amendment. At some point, however, an accommodation of religion becomes an "unlawful fostering of religion." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987). The Virginia exemption statute is such a case. The Court should grant this writ to resolve the critical question of whether a religious exemption from health and safety regulations that do not impose

any burden on the free exercise of religion violates the Establishment Clause of the First Amendment.

CONCLUSION

The writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FOREST HILLS EARLY LEARNING CENTER, INC.,
ACADEMY DAY CARE, INC., AND
HOLLOMAN CHILD CARE CENTERS, INC.,
Petitioners,

v.

LARRY D. JACKSON, AS DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE COMMONWEALTH OF VIRGINIA,

and

GRACE BAPTIST CHURCH, *et al.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 87-3713, 87-3714, 87-3703.

FOREST HILLS EARLY LEARNING CENTER, INC.; ACADEMY DAY CARE, INC.; HOLLOMAN CHILD CARE CENTERS, INC.,
Plaintiffs-Appellees,

v.

GRACE BAPTIST CHURCH; BEREAN BAPTIST CHURCH; THE ROCK CHURCH; TABERNACLE BAPTIST CHURCH,
Defendants-Appellants,

COALITION FOR RELIGIOUS FREEDOM; UNITED STATES OF AMERICA,
Amicus Curiae,

and

LARRY D. JACKSON, DIRECTOR, DEPARTMENT OF WELFARE AND INSTITUTIONS, COMMONWEALTH OF VIRGINIA; SHENANDOAH BAPTIST CHURCH; ROBERT L. ALDERMAN, PASTOR,
Defendants.

FOREST HILLS EARLY LEARNING CENTER, INC.; ACADEMY DAY CARE, INC.; HOLLOMAN CHILD CARE CENTERS, INC.,
Plaintiff-Appellees,

v.

LARRY D. JACKSON, DIRECTOR, DEPARTMENT OF WELFARE AND INSTITUTIONS, COMMONWEALTH OF VIRGINIA,
Defendant-Appellant,

and

SHENANDOAH BAPTIST CHURCH; ROBERT L. ALDERMAN, PASTOR; GRACE BAPTIST CHURCH; BEREAN BAPTIST CHURCH; THE ROCK CHURCH; TABERNACLE BAPTIST CHURCH,
Defendants.

FOREST HILLS EARLY LEARNING CENTER, INC.; ACADEMY DAY CARE, INC.; HOLLOMAN CHILD CARE CENTERS, INC.,
Plaintiffs-Appellees,

v.

SHENANDOAH BAPTIST CHURCH;
ROBERT L. ALDERMAN, PASTOR,
Defendants-Appellants,

and

LARRY D. JACKSON, DIRECTOR, DEPARTMENT OF WELFARE AND INSTITUTIONS, COMMONWEALTH OF VIRGINIA; GRACE BAPTIST CHURCH; BEREAN BAPTIST CHURCH; THE ROCK CHURCH; TABERNACLE BAPTIST CHURCH,
Defendants.

Argued Feb. 4, 1988.

Decided May 6, 1988.

Before RUSSELL and HALL, Circuit Judges, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

This challenge to the constitutionality of Virginia's exemption of religiously affiliated child care centers from state licensing requirements has been before this court on several occasions. *See Forest Hills Early Learning Center v. Lukhard*, 728 F.2d 230 (4th Cir.1984); *Forest Hills Early Learning Center v. Lukhard*, 789 F.2d 295 (4th Cir.1986). Acting on the basis of our earlier instructions, the district court conscientiously reviewed the various requirements of the licensing statute and held that compliance with them would not impermissibly burden the churches' free exercise rights. Consequently, the court concluded that the statute exempting the churches from obtaining licenses and from complying with regulations governing child care centers violates the establishment clause of the first amendment. *Forest Hills Early Learning Center v. Lukhard*, 661 F.Supp. 300 (E.D.Va.1987). Because the Supreme Court's recent decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, —— U.S. ——, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987), requires an analysis different from that which we previously employed, we reverse the judgment of the district court and hold the challenged statute to be constitutional.

I

The background of this dispute has been set forth in detail in our earlier opinion in this case. *Forest Hills*, 728 F.2d at 233-37. A brief review will suffice for the present discussion.

The state of Virginia since 1948 has required all child care center operators to obtain a license, and to comply with certain basic standards. In 1976 the Department of Welfare promulgated new and substantially broader and

more stringent regulations, setting detailed mandatory standards concerning, among other areas, programs, space, health, nutrition, disciplinary practices, and parental participation. Spurred to examine their positions by this more intensive regulation and by news of related controversies in other states, some churches informed state authorities that their religious beliefs could not permit them to apply for or accept a state license to carry out a function they consider an integral part of their religious ministry. In response to these concerns, the Virginia legislature enacted Va. Code § 63.1-196.3, which exempts child care centers operated by religious institutions, at their option, from licensing and compliance with many regulations. Exempt centers must still meet basic health and safety standards.

The appellees are child care centers without religious affiliations. They allege that the exemption of religious centers from licensing requirements places secular centers at a competitive disadvantage, and that they have suffered actual injury as a result of this effect.

II

The churches contend that the secular child care centers lack standing to challenge the constitutionality of the exemption because they have introduced no evidence, beyond assertions, that they have suffered actual economic injury as a result of the exemption of religious centers. The district court ruled that the secular centers had demonstrated sufficient injury to establish standing. 661 F.Supp. at 307-08.

The Supreme Court's decision last term in *Arkansas Writers' Project v. Ragland*, — U.S. ——, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), supports the secular centers' claim of standing. In that case a publisher whose magazine was subject to the general state sales tax brought suit challenging the constitutionality of a sales tax ex-

emption granted to certain types of magazines. The Court held that the plaintiff did have standing to bring that challenge, pointing to "the numerous decisions of this Court in which we have considered claims that others similarly situated were exempt from the operation of a state law adversely affecting the claimant." 107 S.Ct. at 1726. The facts and positions of the parties in the present case are closely analogous to those in *Arkansas Writers' Project*, and the same principle must govern.

III

Our earlier analysis of the statutory exemption was guided by the three-prong test for establishment clause violations articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The Supreme Court's decision last term in *Amos* adheres to the *Lemon* test, but explains and clarifies it in ways which require us to revise our analysis.

At issue in *Amos* was a statute specifically exempting religious organizations from the ban on religious discrimination imposed on all other employers by Title VII of the Civil Rights Act of 1964. The plaintiff was a building engineer employed in a gymnasium run as a non-profit facility open to the public by entities connected with the Mormon Church. He was fired when he failed to qualify as a member in good standing of that church. The district court held that the exemption violated the establishment clause.

On direct appeal, the Supreme Court reversed. The Court employed the *Lemon* test for distinguishing between permissible accommodations and unconstitutional establishments of religion: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon*,

403 U.S. at 612-13, 91 S.Ct. at 2111. The Court held that the exemption of religious employers from Title VII's mandate passed each of the elements of the *Lemon* test. In reaching its conclusion, it emphasized that "'[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.'" *Amos*, 107 S.Ct. at 2867, *quoting Walz v. Tax Comm'n*, 397 U.S. 664, 673, 90 S.Ct.1409, 1413, 25 L.Ed.2d 697 (1970).

The Court held it a permissible and sufficient legislative purpose "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 107 S.Ct. at 2868. The government interference to be avoided includes both positive statutory mandates to which a religious group would have to conform its practices, and the "significant burden on a religious organization" caused by forcing it to defend its beliefs and practices in extended free exercise litigation before "a judge [who may] not understand its religious tenets and sense of mission." *Amos*, 107 S.Ct. at 2868.

The potential for just the sorts of burdens the Court is concerned with is very clear in the present case. Absent the exemption, some church leaders would immediately be forced to violate their convictions against submitting aspects of their ministries to state licensing, or face legal action by the state. This would be an unseemly clash of church and state which the legislature might well wish to avoid. Our earlier opinion shifted to the churches the initial burden of producing evidence "to establish the extent, if any, of their free exercise rights in the exempted activities." *See Forest Hills*, 728 F.2d at 246. As a result, they have already been put to the difficult and intrusive burden of attempting to persuade a secular court of the sincerity and centrality of the beliefs they consider threatened by government licensing.

The interference that the Supreme Court sought to avoid is apparent in an approach which permitted the district court to declare that "while the [churches] may characterize this activity as a part of their ministries, the Court is not bound to accept this characterization," and to conclude that "operation of child care centers by these sectarian institutions is a secular, and not religious, activity." *Forest Hills*, 661 F.Supp. at 309. The district court, noting that child care centers in general are relatively recent phenomena, suggested that "sectarian groups, in establishing day care centers, were responding to secular economic need rather than expanding the scope of their ministries." 661 F.Supp. at 309. But religious groups have throughout history reshaped their ministries to respond to changed circumstances. *Amos* clarifies that it is a legitimate legislative purpose to avoid interference with the execution of religious missions in a nonprofit area in which a church operates, without reference to the role played by churches in the past.*

Addressing the requirement that a law must have a "principal or primary effect . . . that neither advances nor inhibits religion," *Lemon*, 403 U.S. at 612, 91 S.Ct. at 2111, the Court distinguished laws such as those invalidated in *Lemon* which positively aid, endorse, and advance religion, from laws which, by adopting a hands-off policy, leave the way open for churches to advance their own teachings. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 107 S.Ct. at 2868-69. Virginia in exempting religious child care centers from its licensing

* The Supreme Court has not decided whether the state may as readily exempt for-profit operations of religious groups from otherwise applicable regulations. *Amos*, 107 S.Ct. at 2873 (Blackmun, J., concurring) and 2875 (O'Connor, J., concurring).

requirement, cannot be said to be "advanc[ing] religion through its own activities and influence." On the contrary, we believe that "the objective observer should perceive [this exemption] as an accommodation of the exercise of religion rather than as a government endorsement of religion." *Amos*, 107 S.Ct. at 2875 (O'Connor, J., concurring). The fact that this accommodation may make the churches' task marginally easier than it would be were no exemption given, the Supreme Court has indicated, is of no moment. Nor does a regulatory statute's singular exemption of religious groups render its purpose suspect: "Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no need to require that the exemption comes packaged with benefits to secular entities." *Amos*, 107 S.Ct. at 2869.

Finally, the Court held that exemptions such as those challenged in *Amos* and in the present case actually lessen the risk of entanglement between church and state. The burdensome issue-by-issue free exercise litigation that would be necessary absent a general exemption "results in considerable ongoing government entanglement in religious affairs." *Amos*, 107 S.Ct. at 2872. (Brennan, J., concurring). This would both chill and interfere with religious groups, enmeshing judges in intrusive and sometimes futile attempts to understand the contours, sincerity, and centrality of the religious beliefs of others. *Amos*, 107 S.Ct. at 2870 (opinion of the Court) and 2872 (Brennan, J., concurring).

In sum, applying to these nonprofit facilities the *Lemon* test as now explained by *Amos*, we do not discern any distinctions that would justify a result in this case different from that reached in *Amos*. Indeed, if an exemption is permissible in the context of employment practices in a gymnasium, one can only be more solidly justified where it acts to prevent state interference with

church programs that provide education and care for children.

IV

Our decision on the merits renders moot the appeal of Shenandoah Baptist Church from an order dismissing it from the case.

Since the appellees are no longer the prevailing party within the meaning of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, we vacate the district court's award of attorney's fees.

The judgment of the district court declaring Va. Code § 63.1-196.3 unconstitutional is reversed, and the injunction it issued is dissolved.

APPENDIX B

UNITED STATES DISTRICT COURT,
E.D. VIRGINIA,
Richmond Division.

Civ. A. No. 80-0116-R.

FOREST HILLS EARLY LEARNING CENTER, INC., *et al.*,
Plaintiffs,

v.

WILLIAM L. LUKHARD, AS DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE COMMONWEALTH OF VIRGINIA,
Defendant,

and

GRACE BAPTIST CHURCH, TABERNACLE BAPTIST CHURCH, BEREAN BAPTIST CHURCH, AND THE ROCK CHURCH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Defendant-Intervenors.

May 15, 1987.

MEMORANDUM OPINION

RICHARD L. WILLIAMS, District Judge.

This matter is before the Court following a remand by the United States Court of Appeals for the Fourth Circuit. Plaintiffs are nonsectarian operators of child

care centers. They brought this action challenging the constitutionality of Virginia's statutory exemption of religiously affiliated child care centers from the general licensing requirements imposed upon the operation of such centers by the Commonwealth. The action is nominally against the named Director of the Department of Social Services in his official capacity. The complaint seeks a declaration that the exemption is unconstitutional and injunctive relief compelling general application of the child care licensing provisions to all child care centers irrespective of religious affiliation. Defendant-intervenors Grace Baptist Church, Tabernacle Baptist Church, Berean Baptist Church and The Rock Church represent a class of sectarian operators of child care centers that intervened to demonstrate the existence of free exercise rights in the exempted activities. For the reasons stated below, the Court concludes that the exemption statute, Va.Code § 63.1-196.3, violates the establishment clause of the First Amendment to the United States Constitution and enters judgment in favor of the plaintiffs.

Procedural History

Plaintiffs Forest Hills Early Learning Center, Inc., Academy Day Care, Inc., and Holloman Child Care Centers, Inc. filed their original complaint against William Lukhard in his official capacity in 1979. United States District Judge Warriner held that, because the secular centers' claims of injury were pure speculation, they had no standing to sue. 480 F.Supp. 636 (E.D.Va. 1979). Plaintiffs filed a second complaint in 1980, alleging "substantial injury" but the District Court again held that plaintiffs lacked standing to sue. 487 F.Supp. 1378 (E.D.Va.1980). That decision was appealed to the United States Court of Appeals for the Fourth Circuit which held dismissal on that basis erroneous and remanded for further consideration of the standing issue on an expanded record. *Forest Hills Early Learning Center,*

Inc. v. Lukhard, No. 80-1272 (4th Cir. Jan. 9, 1981) (unpublished), listed at 642 F.2d 448. On remand, the District Court denied defendant's motion to dismiss for lack of standing but granted defendant's motion for summary judgment. 540 F.Supp. 1046 (E.D.Va. 1982). The District Court held: (1) the exemption statute had a secular legislative purpose; (2) the statute's primary effect was not to advance religion; (3) the statute did not foster excessive government entanglement with religion; (4) the statute did not violate the establishment clause; and (5) the statute did not violate the equal protection clause.

The plaintiffs appealed the judgment of the District Court to the Court of Appeals. The Fourth Circuit affirmed in part, vacated in part, and remanded to the District Court. 728 F.2d 230 (4th Cir.1984). The Fourth Circuit held that the Commonwealth of Virginia failed to establish the existence of free exercise rights justifying the exemption as an accommodation of free exercise rights. The Fourth Circuit noted that the accommodation of free exercise rights could provide a "saving 'secular purpose' for the exemption under establishment clause challenge." 728 F.2d at 241. The Fourth Circuit suggested class intervention of sectarian institutions to allow an efficient adjudication of the existence of any free exercise rights in the exempted activities, but instructed the District Court that if class intervention did not occur, it should enter judgment declaring the statute unconstitutional. *Id.* at 247.

On remand, the District Court denied class certification and entered summary judgment for the plaintiffs. On appeal, the Fourth Circuit stated that the District Court "misapprehended the purport of our decision and nullified entirely the purposes of a remand herein," necessitating return to the District Court once more "for

the purposes stated in our earlier opinion herein." [1] 789 F.2d 295 (4th Cir.1986).

Factual Background [2]

The Commonwealth of Virginia has regulated all child care centers since at least 1948 by requiring these centers to meet certain licensing standards. From 1968 to 1979, all persons who operated child care centers, without regard to sectarian or non-sectarian affiliation, were required to comply with the licensing requirements of Va. Code §§ 63.1-195 through 63.1-219 and the regulations promulgated thereunder. An applicant for a license under these provisions was required to submit an application to the Commissioner of the Department of Welfare [3] containing an outline of the center's proposed activities, facilities and services, § 63.1-197; the Commissioner was then required to investigate the applicant's proposal and to inquire into the character, reputation and financial responsibility of the applicant, § 63.1-198. The applicant was required to grant the Commissioner reasonable opportunity to inspect its facilities, books and records and to interview its employees and agents. *Id.*

If the Commissioner found that the applicant's operation was reasonably conducive to the welfare of the children it might serve and that the applicant's financial responsibility gave reasonable assurance of continued maintenance of its operation, the Commissioner was to issue a license, § 63.1-199. The Commissioner retained the right to inspect the center and to interview any employee or customer of the center at reasonable times, § 63.1-210. In

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[1] On remand, the case was transferred to United States District Judge Richard L. Williams, due to the death of Judge Warriner.

[2] Much of this factual background is taken from the Fourth Circuit's opinion at 728 F.2d 230, 233-36.

[3] The name of the Department of Welfare changed to Department of Social Services in 1984.

addition to complying with these statutory requirements, a person seeking a license for operating a center had to comply with regulations drawn up by the State Board of Welfare that prescribe general standards and policies for the operation of child care centers. *See* § 63.1-202.

During the early 1970's, the number of child care centers in Virginia increased significantly to meet the rising demand for outside-the-home child day care. As the number of centers increased, the Virginia Department of Welfare received numerous complaints that many of the centers were providing inadequate facilities, meals and supervision. Based upon an investigation, the Department determined that many centers were sacrificing the best interests of the children in order to maintain financial stability and to offer competitive prices. The Department further determined that many parents never visited a center before they enrolled their children there and that decisions concerning the choice of a center were often made without any parental knowledge or information about the centers.

The Department thereupon concluded that the regulations concerning licensing and operation should be upgraded to insure that the pressures of a competitive marketplace did not intrude upon the well-being of children utilizing the service of a center. In 1976, the State Board promulgated new and more stringent regulations. These regulations imposed substantial requirements on all child care centers in many areas, including space, health, safety, and nutritional standards, child/staff ratios, administrative structure, staff applications, parental participation, recordkeeping, program requirements, financial disclosure, disciplinary practices and others.

These standards were adopted in 1976 and applied to all child care centers, as had been the practice with prior regulations in the area. After the regulations were implemented a number of churches that operated child care

centers opined to the Commissioner of the Virginia Department of Welfare, William L. Lukhard, that the new licensing requirements infringed their right freely to exercise their religious beliefs. In response to these complaints the Virginia legislature enacted Va.Code § 63.1-196.3, which exempts all "[c]hild care center[s] operated or conducted under the auspices of . . . religious institution[s]" from compliance with the licensing requirements of § 63.1-196. Those requirements remained fully applicable to all nonsectarian child care centers, and, by express statutory provision, to any sectarian centers whose sponsors nevertheless elect to be covered. § 63.1-196.3 D.

Section 63.1-196.3, which is set forth in full in the Appendix to this opinion, does require the sectarian centers to meet several requirements but these requirements are minimal and consist mainly of compliance with generally applicable health and safety standards related to human occupancy and use of physical facilities. In lieu of applying for and securing a license, the sectarian institutions have merely to file with the Commissioner of the Department of Social Services an initial and thereafter annual statement of intent to operate a child care center; certify that they have disclosed to all parents or guardians of enrolled children the qualifications of the staff personnel; present documentation of their tax-exempt status and of their compliance with local health and fire ordinances and with certain staff ratio requirements; and make public disclosure of certain aspects of their operations. If an exempt center fails to file the required statement of intent, the Commissioner may take "such action as he determines appropriate," including a suit to enjoin its operation. § 63.1-196.3 B. If a parent or guardian lodges a complaint with any local welfare, health, or fire department related to an exempt center's failure to comply with generally applicable health and safety regulations, those local agencies may inspect the center's facilities and take "appropriate action as pro-

vided by law, including a suit to enjoin the operation of the child-care center." § 63.1-196.3 C. These are the only official inspection and enforcement mechanisms provided for the exempt centers. In contrast to the nonsectarian centers, no state level inspection or enforcement mechanisms beyond that related to the filing statement requirement are provided for operation of the exempt centers.

A major revision of the minimum standards was initiated in 1982 when the Governor's Regulatory Reform Advisory Board selected the Department of Social Services for review of its regulations. In response to the Board's action, the Division of Licensing in the Department of Social Services developed a work plan for the evaluation of the Minimum Standards for Licensed Child Care Centers which was approved by the Governor in February 1983.

Over the next six months, the Division reviewed the child care center standards and submitted a report to the Governor's Advisory Board concerning them. In January 1984, the Division initiated a formal revision process by notifying all licensed centers and other interested parties that a revision of the standards was underway. It also formulated an ad hoc advisory committee of 21 members representing directors of child care centers, state and local government officials, specialists in child care development, and other interested community leaders. The ad hoc advisory committee reviewed the standards and recommended that certain standards be revised. The Division of Licensing prepared a rough draft of revisions in April 1984. That draft was reviewed by the ad hoc advisory committee, after which the Division formulated a preliminary draft for circulation to licensed centers and others for review and comment in June 1984.

After the informal comment period, the Division and the ad hoc advisory committee reviewed the comments

and recommended final revisions. In November 1984, the Commissioner of the Department of Social Services sent draft revised minimum standards to the State Board of Social Services recommending that the draft be made the subject of formal public comment. The Board in turn approved the draft for public comment and public hearing. After the public comment and public hearing process, the Division of Licensing revised the draft a last time, submitted it for approval to the Governor's Regulatory Reform Advisory Board and the Department of Planning and Budget and once again to the State Board of Social Services. The revised standards were adopted by the State Board of Social Services on October 17, 1985, effective April 1, 1986.[4]

As noted by the Fourth Circuit at 728 F.2d 236, the sectarian centers are totally relieved of official state regulation in the areas of licensing itself, and of program, insurance, financial resources and management, staff qualification, and internal administration following licensure, while the nonsectarian centers are subject to extensive regulation in these areas, enforceable by state agency inspection and legal sanctions. Sectarian centers have only limited disclosure and certification requirements and no sanctions exist as they do for nonsectarian centers.

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[4] The minimum standards are located in the Appendix to this opinion. They can be summarized as follows: Part I—Introduction provides definitions, legal base, purpose and applicability of the standards. Part II—Administration explains sponsorship and operational, financial, and recordkeeping responsibilities. Part III—Personnel includes qualifications, health requirements, training, and personnel record requirements. Part IV—Supervision sets forth guidelines and ratio requirements. Part V—Physical Environment explains requirements regarding space, furnishings, equipment as well as requirements to insure safety, health and comfort. Part VI—Programs and Services deals with admission policies and procedures, health care, behavior management, food services, activities, and communication with parents. Part VII—Emergencies deals with training, equipment and procedures for emergencies.

In the area of health and safety, sectarian centers are also relieved of a wide range of regulatory standards which still apply to nonsectarian centers. Sectarian centers are subject only to those health and safety standards already applicable to the general population through local and state fire, safety, and sanitation codes. Nonsectarian centers are subject to state level inspection and enforcement mechanisms while sectarian centers are subject only to the inspection and enforcement powers of local health, welfare, and fire departments acting on complaints of parents.

Facing these differences in state regulation, plaintiffs brought this suit seeking a declaration that the exemption is unconstitutional and an injunction compelling application of the licensing provisions to all child care centers.

Issues on Remand

In its first decision on the merits, the Fourth Circuit stated that the test of whether the exemption "impermissibly favors 'religion over non-religion' " is the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Under that test, a statute is unconstitutional if it lacks a secular purpose, or if it has the primary effect of advancing religion, or if it fosters excessive governmental entanglement with religion. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d at 238, citing *Lemon v. Kurtzman*, 403 U.S. at 612-13, 91 S.Ct. at 2111. The state argued that the exemption statute advanced the secular purpose of accommodating the free exercise rights of church-run child care centers. Whether the asserted purpose justified the exemption, the Fourth Circuit concluded, would be determined by "whether and to what extent the free exercise rights accommodated by the exemption did in fact exist." *Id.* at 239.

Nothing in the Supreme Court's decision of *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29

(1985), affects the Fourth Circuit's analysis of the focal issue. In that case, the Court applied the three-prong test of *Lemon v. Kurtzman* to determine whether a state statute authorizing a period of silence for meditation or voluntary prayer violated the establishment clause. With respect to the secular purpose test, the Court stated "it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion,'" citing Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 1368, 79 L.Ed.2d 604 (1984). *Lynch v. Donnelly* also looked to *Lemon* for controlling law. In her concurrence, Justice O'Connor wrote:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice on review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

465 U.S. at 690, 104 S.Ct. at 1368. It is clear from this statement that Justice O'Connor's question is but another way of asking whether the challenged statute has a secular or a religious purpose. This Court does not read Justice O'Connor's concurrence in *Lynch v. Donnelly* or the decision in *Wallace v. Jaffree* to reject or modify the secular purpose requirement.

Moreover, the Court in *Wallace v. Jaffree* specifically addressed the state's claim that the statute at issue served the secular purpose of accommodating religion. The Court concluded that that contention should be resolved by determining whether there was a need to relieve individuals from a government requirement because the requirement impeded their free exercise of religion. *Wallace v. Jaffree*, 472 U.S. at 57-58 n. 45, 105 S.Ct. at 2491 n. 45. That is precisely the analysis applied by the Fourth Circuit in its February 1984 decision in this

case and the issue before this Court on remand. This Court concludes that *Wallace v. Jaffree* does not make any change in the pertinent law involved in this proceeding.

Accordingly, the issue before this Court is whether and to what extent free exercise rights expressed in exempt activities would be burdened by the application of the state's minimum standards for licensed child care centers to church-run centers and, if so, whether that burden is nevertheless justified by a compelling state interest.

A. Class Certification

Pursuant to the mandate of the Fourth Circuit in *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, defendant-intervenors filed a motion to certify a class. Evidence was heard and the Court conditionally certified the class pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(3), and 23(c)(1), naming defendant-intervenors as class representative. After notice was given to the class members, identified as all sectarian child care centers currently exempt under Virginia Code § 63.1-196.3 and all sectarian child care centers that have applied for such an exemption, and responses were received, the Court found that Rule 23(a) and (b) requirements were satisfied and granted class certification.

The Court found that there exists a class of all religious institutions which operate or conduct child care centers, and which have been exempted from state licensure pursuant to § 63.1-196.3 of the Code of Virginia, or have filed documentation with defendant Lukhard indicating their intent to obtain such an exemption. Defendant-intervenors Grace Baptist Church, Berean Baptist Church, Tabernacle Baptist Church, and The Rock Church are members of this class.

The Court found that Rule 23(a) requirements were met. First, the number of sectarian child care centers

that belong to the class renders joinder of all such centers in this action impracticable, satisfying the requirement of Fed.R.Civ.P. 23(a)(1). Second, there are questions of law and fact concerning the burden that would be imposed on religious beliefs by state licensure of child care centers under the minimum standards, the state's interest in regulating such centers, and the least restrictive means of satisfying the state's interests that are common to the class, satisfying Rule 23(a)(2). Third, the free exercise claims and defenses of the class representatives are typical of the claims and defenses of the class, satisfying Rule 23(a)(3). Finally, the class representatives more than fairly and adequately protect the interests of the class, satisfying Rule 23(a)(4).

Questions of law and fact common to the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this matter, satisfying Rule 23(b)(3). On this basis, the Court unconditionally certified the class with the defendant-intervenors, as class representative, charged with the task of presenting evidence to establish "the extent of any free exercise rights had by the sectarian institutions in the exempted activities. . . ." 728 F.2d at 246.

B. Standing

The issue of plaintiffs' standing, although resolved in an earlier stage of the proceedings, was raised by defendant-intervenors during the proceedings before this Court. As discussed in the procedural history, plaintiffs appealed to the Fourth Circuit following the District Court's granting a motion to dismiss for lack of standing in 1980. The Fourth Circuit vacated and remanded the case, directing plaintiffs to "allege 'specific, concrete facts demonstrating that the challenged practices harm' them and that they 'personally would benefit in a tangible way

from the Court's intervention,' " citing *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975). That Court further noted that "submission of the proffered evidence and the particulars of the secular centers' actual financial loss, if any, would be appropriate before a decision about standing is made." *Forest Hills Early Learning Center, Inc. v. Lukhard*, No. 80-1272, slip op. at 3-4 (4th Cir. Jan. 9, 1981) [642 F.2d 448 (table)].

After plaintiffs supported their complaint with affidavits, the state's renewed motion to dismiss the complaint for lack of standing was denied. The District Court then upheld the constitutionality of the statute, but the Fourth Circuit vacated the summary judgment for the state, and remanded the case, concluding that "summary judgment might properly be granted to the nonsectarian plaintiffs on the present record."–728 F.2d at 233. Although the Fourth Circuit notes that "[n]o question of standing is now raised," that Court would not have been willing to grant summary judgment for the plaintiffs had the standing issue not been resolved in plaintiffs' favor. The summary judgment record, including the affidavits of financial injury, was the basis of the Fourth Circuit's decision that plaintiffs were entitled to summary judgment but for the decision to remand to allow intervention by a class of sectarian child care centers that could demonstrate the extent of any free exercise rights in the exempted activities. In the November 21 hearing on several motions filed by defendant-intervenors, this Court ruled that the issue had been resolved, noting that the requisite injury had been shown by the plaintiffs.

C. Free Exercise Claims of Defendant-Intervenors

The tests to be applied to the churches' free exercise claims were set forth in *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d at 240-41. First, "the free-

dom to act upon religious beliefs—to engage in religious activity—is not absolute, as is the right to hold those beliefs; activity may be curtailed in some circumstances for the protection of sufficiently compelling societal interests. *Cantwell v. Connecticut*, 310 U.S. 296, 300-04, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940)." The Fourth Circuit continues, "Whether state law impinges at all upon free exercise rights first depends upon whether 'the purpose or effect of [the] law is to impede the observance of . . . religion.' (citations omitted). Whether, in turn, the holding or active expression of particular beliefs involves the observance of 'religion' depends upon the sincerity of the beliefs held and the centrality of those beliefs to an identifiable religious faith or commitment; only those laws that impede the holding or active expression of sufficiently sincere and central religious beliefs impinge upon free exercise rights," citing *Wisconsin v. Yoder*, 406 U.S. 205, 215-19, 92 S.Ct. 1526, 1533-35, 32 L.Ed.2d 15 (1972). The Fourth Circuit concludes, "If, under these tests, a particular law does impede 'religious' activity, even indirectly, it violates the free exercise clause, unless the impediment is justified by a compelling state interest arising from some substantial threat to public health, safety, peace, or order, (citations omitted) and is the least restrictive means for protecting the compelling state interest."

The Fourth Circuit also explained the issue of which activities of religious institutions are entitled to free exercise protections, noting first that "it could not be thought . . . that *all* activities, or at least all 'good works' activities, of concededly religious institutions, are *per se* 'religious,' hence entitled to free exercise protections. This simply is not the law," *Forest Hills*, 728 F.2d at 242-43, citing *Walz v. Tax Commission*, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970). The explanation continues. "The rule instead is that some activities of undoubtedly 'religious' institutions may fall completely

outside the realm of protected 'religion,' notwithstanding their undoubted legitimacy or manifest social value." Regarding this case, the Fourth Circuit concludes, "Neither, obviously, does the whole sweep of exempt activities here lie so manifestly at the core of religious practices—such as prayer, worship, and ritual—as to be entitled *per se* to protection." 728 F.2d at 243. *See also id.* at 246, n. 18, where the Fourth Circuit states that this Court must make a "general identification of those activities that are 'religious' and those that are not under free exercise doctrine," concededly involving "line-drawing between 'religious' and 'secular' activities of the sectarian child care center operations. . . ."

The Court notes first in considering this issue that while it is bound by the factual matters stipulated to by the parties, it is not bound by any stipulations of legal conclusions. *See Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986); *Saviano v. Commissioner of Internal Revenue*, 765 F.2d 643 (7th Cir. 1985). Therefore, to the extent the stipulations filed by the parties constitute factual matters, the Court incorporates those into its findings of fact found throughout this opinion. The specific statements that the Court considers to be conclusions of law rather than findings of fact are those statements in paragraphs 5 and 10 that the operation of child care centers by two of the defendant-intervenors is in each case a "part of its ministry." The Court also notes that paragraphs 18-21 of the stipulations are no longer applicable to the case since Shenandoah Baptist opted out of the class. With these corrections, the Court hereby incorporates the stipulations into its findings of fact.

Regarding the issue of whether the operation of child care centers by class members is a part of their respective ministries, this Court concludes that while the class members may characterize this activity as a part of their

ministries, the Court is not bound to accept this characterization. Applying the tests set forth by the Fourth Circuit, the Court concludes that the operation of child care centers by these secarian institutions is a secular, and not religious, activity. Therefore, the operation of such centers is not entitled *per se* to free exercise protection. The operation of a child care center is not an "active expression" of the churches' particular beliefs regarding their ministering to their children but is merely incident to such "active expression."

Although the Court assumes, without making a specific finding, the sincerity of the beliefs of the class, the Court concludes that operating a child care center is not an "active expression" of any centrally held religious beliefs of the class.

Although there are approximately 215 sectarian child care centers that are either exempted under Va. Code § 63.1-196.3 or have applied to be exempted, at least 106 church-run centers have chosen to obtain licenses rather than exemptions. While this is not conclusive, it is probative of whether operating a child care center is an active expression of centrally held religious beliefs. In addition, two defendant-intervenors—Berean Baptist and Tabernacle Baptist—applied for and accepted licenses for a period of time during the 1970's, indicating that there was no free exercise problem at that time. Moreover, child care centers are of recent origin, their numbers increasing during the 1970's as more mothers began to work outside the home. It would appear that sectarian groups, in establishing day care centers, were responding to a secular economic need rather than expanding the scope of their ministries. Despite this conclusion regarding the operation of child care centers by the sectarian institutions, this Court examines below the particular requirements the defendant-intervenors claim would impinge their free exercise rights.

1. The Licensing Requirement

The defendant-intervenors' central free exercise claim focuses on the licensing requirement itself. Virginia Code § 63.1-196 requires any operator of a child care center to obtain a license from the Commissioner of the Department of Social Services and to post that license in a conspicuous place on the premises. In the view of the churches, accepting a license from the state (1) requires that they acknowledge the lordship of the state over Jesus Christ and (2) gives the state the right to say whether a church-run child care center can exist.

The state may regulate the secular activities of religious organizations as long as it does not infringe on the exercise of religious beliefs. *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The Supreme Court has recognized that the state's power to regulate secular activities of religious organizations extends to private, religious schools. *Pierce v. Society of Sisters*, 268 U.S. 510, 534, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925). Courts have upheld licensing requirements for church-run child care centers in four other states. *Department of Social Services v. Emmanuel Baptist Pre-School*, 150 Mich. App. 254, 388 N.W.2d 326, 330 (1986); *North Carolina v. Fayetteville Street Christian School*, 42 N.C. App. 665, 258 S.E.2d 459 (1979), *vacated and remanded on other grounds*, 299 N.C. 351, 261 S.E.2d 908, *vacated and remanded on other grounds following rehearing*, 299 N.C. 731, 265 S.E.2d 387, *appeal dismissed*, 449 U.S. 807, 101 S.Ct. 55, 66 L.Ed.2d 11 (1980); *Kansas ex rel O'Sullivan v. Heart Ministries, Inc.*, 227 Kan. 244, 607 P.2d 1102 (1980); *Kansas ex rel Pringle v. Heritage Baptist Temple Inc.*, 236 Kan. 544, 693 P.2d 1163 (1985); *Texas v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692 (Tex. 1984); *Roloff Evangelistic Enterprises, Inc. v. Texas*, 556 S.W.2d 856 (Tex. Civ. App. 1977), *appeal dismissed*, 439 U.S. 803, 99 S.Ct. 58, 58 L.Ed.2d 96, *rehearing denied*, 439 U.S. 998, 99 S.Ct. 601, 58 L.Ed.2d 672 (1978).

As stated above, this Court concludes that the operation of a child care center, even by a church, is a secular activity not entitling it to free exercise protection. Thus, requiring a church-run child care center to obtain a license to participate in such a secular activity does not burden the free exercise of religion by that church.

The defendant-intervenors' views on licensing did not prevent two of them—Berean Baptist and Tabernacle Baptist—from applying for and accepting licenses for a period in the 1970's. Neither church raised a free exercise objection to the licensure requirement during their period of licensed operation. As the pastors of these churches went through the evolutionary process of acquiring spiritual and political maturity, their institutional positions changed. Their churches went from a position of compliance with the state's mandated licensing requirements to a view that such requirements were an intrusion by the state into their ministries and indeed an attempt by the state to license the pulpit.[5]

What prompted Berean Baptist to return its license and apparently what concerns the other churches as well was a concern that the state can arbitrarily deny a license to a church-run center. This concern is unfounded as a matter of fact and of law. There was no evidence that the state had ever arbitrarily acted to restrict the ability of church-run child care centers to operate their programs according to the mandates of their religious beliefs. Moreover, the churches' concerns are fully addressed by the procedural, statutory and constitutional safeguards that govern the state's conduct with respect to licensing. First, the Administrative Process Act, Va. Code § 9—6.-14:1 et seq., and the Public Participation

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[5] *See* defendant-intervenors' exhibit 18, an excerpt from Dr. Rodney Bell's Bible, which contains his notation: "6/2/78 2:33 a.m. Here I stand! I can do no other. The State of Va. will not license this pulpit! 'By the Grace of God!' I will 'Rot in Jail First.' R. Bell."

Process govern the promulgation of standards for a licensed facility. The record establishes that the state met and exceeded these requirements when promulgating the standards now in effect. Second, the Division of Licensing may revoke or deny a license to an applicant only when it determines that the applicant does not substantially meet the requirements for a license. Third, an applicant whose license is denied or revoked is entitled to appeal that decision in accordance with the Administrative Process Act and may continue to operate during the pendency of such an appeal. Next, the applicant may appeal an adverse decision from an administrative hearing to the Circuit Court, pursuant to Va. Code §§ 63.1-180 and 63.1-213. In addition, the state's conduct is subject to the due process requirements of the United States and Virginia Constitutions. Thus, the state is not free to arbitrarily decide that a particular church-run child care center can or cannot exist.

The Court concludes that the act of licensing a church-run child care center to certify compliance with health, safety and welfare standards would not burden the church's free exercise of religion and would not empower the state to arbitrarily deny a license to an applicant on the basis of the applicant's religion or on any other ground.

Even assuming *arguendo* that the operation of a child care center is a religious activity rather than a secular activity, entitling it to free exercise protection, the licensure requirement's impediment of the free exercise of this activity is justified by the compelling state interest in protecting the health and safety of children and is the least restrictive means for protecting this interest.

The state's compelling interest in protecting the health and safety of children, particularly those under the age of five, in child care outside the home is clear. Indeed, the churches acknowledge the state's compelling interest in this regard.

The state's licensing standards are directed to the protection and promotion of the physical well-being of children in child care outside the home. The minimum standards focus predominantly on the quality of a center's physical facilities and environment, the provision of trained adult supervision sufficient in number for the ages and number of children at the center, the provision of nutritious meals, and the protection of children's health. Although these standards are more detailed in breadth and scope than the requirements imposed upon exempt centers under the exemption statute, they reflect the same basic objective of promoting the health and welfare of children in child care. The churches do not object to the imposition of the requirements contained in the exemption statute or other state regulations aimed at protecting the health and safety of children. Indeed, most of the pastors who testified would not object if the requirements of the minimum standards, with the exception of the specific requirements to which they object, were imposed upon them as part of the exemption statute requirements. The licensing requirement is a reasonable way of assuring and informing consumers that all child care centers in the state meet these standards.

The state's licensing process is the least restrictive means of assuring that all children placed in child care are served in a safe, fit and nurturing environment. If a state is prohibited from acting prospectively to ensure compliance with minimum standards designed to protect children, and is only allowed to act after finding a violation of those standards, the state's effort to prevent physical and emotional harm to children would be seriously eroded. The state would only be able to act after the damage is done. Certification of compliance with minimum standards in advance of the provision of child care services is the only way the state can prevent harm to children in child care centers. Thus, even assuming that the licensure requirement burdens the free exercise of

religion, that burden is permissible under the First Amendment.

2. The Financial Disclosure Requirement.

Virginia Code § 63.1-198 requires the Commissioner of the Department of Social Services to investigate the financial responsibility of an applicant for a child care center license. The minimum standards require an applicant to submit "a projected budget detailing expected income and expenses at the proposed center for the first year of operation; and a complete balance sheet showing separately the current assets committed to, and current liabilities charged against, the proposed center." *See* Minimum Standards, § 2.7(1) and (2).

The Court concludes that requiring a church-run child care center to submit a statement of estimated expenditures and revenues and of assets and liabilities, prior to its first year of operation would not burden a church's free exercise of religion. The information requested by the state on its one-page financial disclosure form represents a minimal intrusion into the financial affairs of one secular activity conducted by a church—its child care center—while serving the purpose of assuring a center's financial ability to comply with the standards.

Moreover, even assuming that the operation of a child care center is a religious activity, entitling it to free exercise protection, the financial disclosure requirement is justified by the state's compelling interest in the protection of children. In addition, this requirement is the least restrictive means for protecting this interest.

This requirement serves the purpose of insuring that a new child care center will be able to operate in compliance with the minimum standards for at least one year despite the heavy start-up costs of a new center. Resources must be available to assure adequate care and protection of the children during the first year of opera-

tion. As explained in a Division of Licensing Programs document, "Issuing a license to a facility that lacks the financial ability to meet the standards could pose a serious threat to the well-being of children in care. This risk can be avoided by identifying the problem before it occurs and by delaying licensure until the sponsor has the necessary resources."

The churches argue that the state does not need this information since they would subsidize their child care centers to stay in operation. This fact would support a showing of financial ability to operate, but it does not obviate the state's concern that such ability be demonstrated.

This requirement is clearly the least restrictive means for protecting the state's interest. The financial information is requested only at the beginning of a center's operation, unless a center demonstrates an inability to comply with the minimum standards at a later date that might be caused by financial problems. The record here indicates that the two churches whose centers were licensed during the 1970's complied with the financial disclosure requirements without objection when they first applied for their licenses. The record also indicates that financial information was not requested after their initial application. Finally, the information requested by the state is less detailed in form and substance than the information churches are required to provide on the application for an exemption for taxation under Internal Revenue Code § 501(c)(3).

Thus, the Court concludes that the financial disclosure requirements do not interfere with the free exercise of religion, serve the state's compelling interest in protecting children by ensuring financial ability to operate and comply with the minimum standards, and are the least restrictive means for establishing this ability.

3. The Prohibition of Corporal Punishment

Section 6.20 of the Minimum Standards provides:

> "There shall be no physical punishment or disciplinary action administered to the body such as, but not limited to, spanking; forcing a child to assume an uncomfortable position (e.g., standing on one foot, keeping arms raised above or horizontal to the body); restraining to restrict movement through binding or tying; enclosing in a confined space, box, or similar cubical; or using exercise as punishment."

The churches' objection to this section is based on the Biblical command "Spare the rod, spoil the child."

The Court concludes that requiring a church-affiliated child care center to refrain from corporal punishment does not burden the free exercise of religion by that church. Because the operation of a child care center is a secular activity, even when conducted by a church, there is no *per se* entitlement to free exercise protection for all activities conducted within that operation.

Even assuming *arguendo* either (1) that the operation of a child care center is a religious activity, or (2) that to the extent a church-run child care center believes it is commanded by the Bible to use spanking as a form of punishment, the prohibition against corporal punishment would burden that church's free exercise of religion, the corporal punishment prohibition's burden on free exercise is justified by the compelling state interest. The Court concludes that the state has a clear and compelling interest in protecting young children in care away from home from physical and emotional harm. That interest is served by prohibiting physical punishment which risks serious physical and mental harm and child abuse, without fostering the development of self-discipline. The record clearly establishes the state's concerns. Spanking a child on the bottom with a hand or object can cause

welts, bruises or bleeding depending on the degree of force used. If the spanking is particularly forceful, it can cause permanent, internal damage to the muscles of the buttocks. Blows to the buttocks may cause damage to bones, nerves and even the genitals. Corporal punishment teaches children that aggressive physical behavior is a viable means to resolve problems with other people.

The record also reflects the state's concern that corporal punishment is closely associated with child abuse, a serious problem that has received nationwide public attention in recent years. Indeed, the state's concern about child abuse is so serious that it has enacted a statute requiring any adult responsible for the care of a child away from home to report any known or suspected incidents of child abuse to public authorities. Even some of the churches that object to the prohibition of corporal punishment believe that it should be used sparingly under strict limitations. Thus they have strictly limited the instances in which they permit the use of corporal punishment by requiring prior parental consent, limiting its use to designated staff and requiring the presence of another adult.

Where religious practices risk or endanger the health and well-being of members of society, the state may regulate such practices to avoid the adverse health consequences. *See, e.g., Kansas ex rel. Pringle v. Heritage Baptist Temple, Inc.*, 236 Kan. 544, 549-550, 693 P.2d 1163 (1985); *Department of Social Services v. Emmanuel Baptist Pre-School*, 388 N.W.2d at 334. The prohibition of corporal punishment in child care centers is precisely such an instance. The Court concludes that the state's prohibition against corporal punishment is justified by a compelling state interest in protecting young children from physical and emotional harm. No other method of preventing the harm from occurring is available to achieve this interest. Thus, this prohibition may be applied to

church-run centers despite the possible burden on their religious conduct.

Moreover, a church subject to licensure could seek a variance from the Department of Social Services to permit it to use corporal punishment under appropriately defined circumstances acceptable to the state. That would permit the state to ensure that centers using corporal punishment because of their religious beliefs do so in ways that minimize the risks associated with corporal punishment.

4. Child Abuse Reporting Requirements

Virginia Code § 63.1-248.3 requires, *inter alia*, "any person providing full or part-time child care for pay on a regularly planned basis . . . who has reason to suspect that a child is an abused or neglected child, shall report the matter immediately except as hereinafter provided, to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred." Although the churches have raised objections about the requirement set forth in the minimum standards concerning staff training in procedures for reporting suspected instances of child abuse to the appropriate public authority, the reporting requirement is a statutory requirement that applies to exempt centers without regard to licensing requirements. Moreover, all of the churches recognize the importance of reporting instances of known or suspected child abuse to the appropriate authorities. They object only to being required to do so before they have had an opportunity to "minister" to the family involved. The Court does not see how the reporting requirement prevents churches from ministering to the families with child abuse problems. The state's overriding interest in stopping child abuse and preventing additional harm overrides any minimal burden a church staff might suffer on account

of the reporting requirements. Accordingly, the Court concludes that the reporting requirements do not burden the churches' free exercise of religion, are justified by a compelling state interest in protecting children from physical harm and abuse, and are the least restrictive means available for protecting this interest.

5. The "Good Moral Character" Requirement

Virginia Code § 63.1-198 requires the Commissioner to investigate the character and reputation of an applicant for a child care center license. In furtherance of that requirement, Section 3.1 of the Minimum Standards provides that no staff member "shall have been convicted of a felony or misdemeanor related to abuse, neglect, or exploitation of children or adults" and that all staff shall be "of good moral character and reputation." *See also* Part 2, Article 1, Section 2.3 of the Minimum Standards. The churches object to these requirements because they believe in the fact that a "person can be regenerated, born again, have a new beginning." The churches believe that they should be free to determine whether a person has been born again and should be hired in the child care center. According to the churches' view, the minimum standards would prevent them from hiring the Apostle Paul. With one exception, the churches do not assert that any of their present personnel would be barred from employment by the minimum standards, and the Division would not object to the employment of that individual. The minimum standards encompass only felonies and misdemeanors related to the abuse, neglect or exploitation of children and adults.

The churches express three fears: (1) that the state would prevent them from applying a stricter test of character than set forth in the standards; (2) that the state might prevent them from hiring an individual whom they deemed to be of good moral character but who might not be deemed to be of good moral character by the state;

or (3) that the state might compel them to hire someone they believed lacked good moral character.

To the extent that the churches would impose a stricter test of good moral character than the state does, there is nothing in the standards to suggest that the state could or would prohibit them from doing so. Thus, that objection does not raise a free exercise concern. To the extent that a church might want to hire someone whose previous conduct suggests a lack of good moral character but whose subsequent conduct in the church's view evidences good moral character because the individual has been converted and since lived an exemplary Christian life, there is nothing in the minimum standards to suggest that a church would be prevented from hiring such a person. Moreover, this Court will not presume that the Department of Social Services would apply the minimum standards so as to preclude hiring such an individual or that it would deny a request for a variance by a church-run center to hire someone the church has determined has good moral character, despite prior conduct that might suggest the contrary.

The Court must also reject the contention that the good moral character standard would enable the state to compel a church-affiliated child care center to hire someone the church felt lacked good moral character. In particular, the churches fear that the state might seek to compel a church to hire a homosexual, even if the church believed homosexuality is immoral. Their fear is based on the fact that the state has a policy against discrimination against homosexuals in public school employment. The fact that the state does not discriminate against homosexuals in public school employment does not support the churches' contention that the Division of Licensing Programs of the Department of Social Services could compel a private child care center that receives no public funding to hire a homosexual. The minimum standards contain no provision that would require a licensed center

to hire someone it did not want to hire. Accordingly, the Court concludes that the good moral character requirements do not impermissibly burden the free exercise of religion by these centers.

6. Program Requirements

Section 6.28 of the Minimum Standards requires licensed centers to provide "experiences which promote growth, well-being, and the appropriate development of growth and fine motor skills; language skills; cognitive skills; social and emotional skills; positive self-concept, curiosity, interest and exploration." The churches fear that the minimum standards would permit the state to impose program content requirements that reflect a secular humanism philosophy, a philosophy they believe is incompatible with their religious beliefs. The minimum standards do not regulate the substantive content of a child care center's program, however. The standards concerning programming and activities are designed to foster the physical and mental development of children by encouraging centers to provide a broad range of activities, without directing the content or substance of such activities. No evidence was presented at trial to suggest that the state has used the licensing process and applied the standards to direct, limit or regulate the religious content or teachings of any child care program subject to the minimum standards. None of the church-run centers that were licensed during the 1970's indicated that the state sought to affect the religious content of their child care programs or to impose its own religious views on the programs of the church run centers. In fact, two of the plaintiffs include religious material—through Bible readings and prayer—in their programs. Therefore, the Court concludes that the risk that the state would interfere with the religious content and program of a church-run child care center is remote and speculative. Thus, there is no basis to conclude that application

of the standards to church-run centers would burden their free exercise of religion or impose contrary religious views on their programs.

Section 6.34(2) of the Minimum Standards requires licensed centers to include rhythm, music, and dancing in the daily activities of its program. The churches object to this provision because they are concerned that the state might require them to expose children to rock and roll music and dancing, which they believe to be sinful.

The churches' objections to these specific program standards are based on a concern about the manner in which they might be applied and not on a belief that the state does and would apply the standards to their centers in a manner that would infringe on their free exercise of religion. Thus, the churches object to the standard requiring the promotion of "positive self-concept" because they cannot know "whether the state would interpret . . . these subjective standards in ways that would conflict with our disciplinary philosophy or belief in the depravity of man." The Court finds no basis to conclude that the state would apply the standards at issue in a manner that would interfere with their belief in the depravity of man, or their teaching of that belief in their centers. Similarly, the churches' objection to the rhythm and music standard is premised on the unfounded notion that the state can and would dictate that churches engage in musical activities they believe to be sinful. There is no evidence that the state seeks to do so through the licensing standards at issue. Accordingly, the Court concludes that the churches' objections on these grounds do not establish a free exercise violation.

Conclusion

In accordance with the findings of fact and conclusions of law stated in this opinion, the Court concludes that the statute, Va.Code § 63.1-196.3, lacks a secular purpose and therefore violates the establishment clause of the

First Amendment to the United States Constitution. While the statute's avowed secular purpose was to accommodate free exercise rights in the exempted activities, the Court finds no *per se* entitlement to free exercise protection for the operation of child care centers by sectarian institutions. Moreover, the Court concludes that, even assuming entitlement to free exercise protection for some of the exempted activities, any burden on free exercise is justified in every case by the compelling state interest. Thus, the statute, found by the United States Court of Appeals for the Fourth Circuit to be "unconstitutionally overbroad under the establishment clause," cannot be salvaged by defendant-intervenors' attempt to establish free exercise rights.

The Court enjoins the Commissioner of the Department of Social Services of the Commonwealth of Virginia from enforcing Va.Code § 63.1-196.3 and orders general application of the child care licensing provisions to all child care centers.

An appropriate order shall enter.

APPENDIX A

§ 63.1-196.3. Child-care center operated by religious institution exempt from licensure; annual statement and documentary evidence required; enforcement; injunctive relief.—A. Notwithstanding any other provisions of this chapter, a child-care center operated or conducted under the auspices of a religious institution shall be exempt from licensure as required by § 63.1-196. Such religious institution shall file with the Commissioner of Welfare, prior to beginning any such operation and thereafter annually, a statement of intent to operate a child-care center, certification that the child-care center has disclosed to the parents or guardians of the children in the center the qualifications of the personnel employed therein and documentary evidence that:

1. Such religious institution has tax exempt status as a nonprofit religious institution in accordance with § 501 (c) of the Internal Revenue Code of 1954, as amended, or that the real property owned and exclusively occupied by the religious institution is exempt from local taxation.

2. Within the prior ninety days, the local health department and local fire marshal or Office of the State Fire Marshal whichever is appropriate, have inspected the physical facilities of the child-care center and have determined that the facility is in compliance with applicable laws and regulations with regard to food service activities, health and sanitation, water supply, building codes, the Virginia Fire Safety Regulations or the Uniform Statewide Building Code and local fire requirements.

3. The child-care center employes supervisory personnel according to the following ratio of adults to children:

a. One adult to four children from zero to twenty-four months.

b. One adult to ten children from ages twenty-four months to six years.

c. One adult to twenty-five children ages six years and older.

Each person in a supervisory position shall be certified by a practicing physician to be free from any disability which would prevent him from caring for such children as will be under his supervision.

4. The following aspects of the child-care center's operations are described in a written statement provided to the parents or guardians of the children in the center and made available to the general public: physical facilities, enrollment capacity, food services, health requirements for the staff and public liability insurance.

B. If a religious institution operates a child-care center and does not file the statement and documentary evidence required by paragraph A hereof, the Commissioner shall give reasonable notice to such religious institution of the nature of its noncompliance and may thereafter take such action as he determines appropriate, including a suit to enjoin the operation of the child-care center.

C. Any parent or guardian of a child in a child-care center who has reason to believe that a child-care center falling within the provisions of this section is not in compliance with the requirements of paragraph A of this section may report the same to the local department of welfare, the local health department or the local fire marshal, each of which may inspect the child-care center for noncompliance, give reasonable notice to the religious institution, and thereafter may take appropriate action as provided by law, including a suit to enjoin the operation of the child-care center.

D. Nothing in this section shall prohibit a child-care center operated by or conducted under the auspices of a religious institution from obtaining a license pursuant to chapter 10 (§ 63.1-195 et seq.) of Title 63.1 of the Code. (1979, c. 425.)

APPENDIX B

MINIMUM STANDARDS FOR LICENSED CHILD CARE CENTERS

Adopted by the State Board of Social Services

October 17, 1985

Effective

April 1, 1986

VIRGINIA DEPARTMENT OF SOCIAL SERVICES
DIVISION OF LICENSING PROGRAMS
8007 DISCOVERY DRIVE
RICHMOND, VIRGINIA 23288

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VR 615-23-02. MINIMUM STANDARDS FOR LICENSED CHILD CARE CENTERS

PART I INTRODUCTION

Article 1 Definitions

§ 1.1

The following words and terms when used in these regulations shall have the following meanings unless the context indicates otherwise:

"Administrator" means the staff person responsible for the day-to-day operation and management of a child care center.

"Adult" means any individual 18 years of age or over.

"Age groups"

"Infant" means children from birth up to 16 months.

"Toddler" means children from 16 months up to two years.

"Preschool" means children from two years up to the age of eligibility to attend public school.

"School age" means children from the age of eligibility to attend public school and older.

"Age of eligibility to attend public school" means five years old by November 30, 1986* as determined on the first day of the fall term of each school year.

* In 1987 this date changes to October 31.

In 1988, and thereafter, this date changes to September 30. (§ 22.1-199 of the Code of Virginia)

"Aide" means the individual responsible for assisting the Child Care Supervisor in program implementation and supervision of children.

Note: Position titles used in these standards are descriptors only and do not preclude the use of other titles by centers.

"Character and reputation" means that findings have established that knowledgeable and objective people agree that the subject maintains business/professional, family, and community relationships which are characterized by honesty, fairness, truthfulness, and a concern for the well-being of others to the extent that the subject is considered suitable to be entrusted with the care, guidance, and protection of children.

"Child" means any individual under 18 years of age (§63.1-195 of the Code of Virginia).

"Child care supervisor" means the individual responsible for assisting in program implementation and supervision of children.

"Commissioner" means the Commissioner of Social Services, also known as the Director of the Virginia Department of Social Services.

"Department" means the Virginia Department of Social Services.

"Department's representative" means an employee or designee of the Virginia Department of Social Services, acting as the authorized agent of the Commissioner in carrying out the responsibilities and duties specified in Chapter 10 of Title 63.1 of the Code of Virginia.

"Evening care" means care provide in a center between the hours of seven p.m. and one a.m., inclusively.

"Licensee" means any individual, partnership, association, or corporation to whom the license is issued.

"Overnight care" means care provided in a center between the hours of one a.m. and six a.m., inclusively.

"Parent" means the biological or adoptive parent(s) or legal guardian(s) of a child enrolled or in the process of being enrolled in a child care center.

"Physician" means an individual licensed to practice medicine in any of the 50 states or the District of Columbia.

"Program director" means the person responsible for programmatic functions and supervision of all staff who work directly with children.

"Sponsor" means an individual, partnership, association, or corporation responsible for the operation of a child care center subject to licensure.

"Staff or center staff" means administrative, program, service, and volunteer personnel including the licensee when the licensee is an individual.

"Volunteer personnel" means persons who work at the center once a week or more often or who are counted in the required ratio of staff to children.

Article 2 Legal Base

§ 1.2

Section 63.1-195 et seq. of the Code of Virginia describes the responsibility of the Department of Social Services for the regulation of residential and day care programs for children, including child care centers.

§ 1.3

Section 63.1-202 of the Code of Virginia requires the State Board of Social Services to prescribe standards for certain activities, services, and facilities for children, including child care centers.

Article 3 Purpose

§ 1.4

The purpose of these Minimum Standards for Licensed Child Care Centers is to protect children who are sepa-

rated from their parents or guardians during a part of the day by:

1. ensuring that the activities, services, and facilities of child care centers are conducive to the well-being of children; and
2. reducing risks in the caregiving environment.

Article 4 Applicability

§ 1.5

These Minimum Standards for Licensed Child Care Centers apply to a private home wherein group care is provided to ten or more children and to any place other than a private family home wherein group care is provided to any number of children.

§ 1.6

Section 63.1-195 of the Code of Virginia defines a child care center subject to licensure as "any facility operated for the purpose of providing care, protection, and guidance to a group of children separated from their parents or guardian during a part of the day only."

EXCEPTIONS: (as set forth under the definition of "child care center" in § 63.1-195 of the Code of Virginia.)

1. "A facility required to be licensed by the Health Department as a summer camp";
2. "A public or private school unless the Commissioner determines that such private school is operating a child care center outside the scope of regular classes";
3. "A school operated primarily for the educational instruction of children from two to five years of age at which children two through four years of age do not attend in excess of four hours per day, and children five years of age do not attend in excess of six and one-half hours per day";

4. "A facility operated by a hospital on the hospital's premises, which provides care to the children of the hospital's employees, while such employees are engaged in performing work for the hospital";

5. "A Sunday school conducted by a religious institution or a facility operated by a religious organization where children are cared for during short periods of time while persons responsible for such children are attending religious services";

6. Exceptions as set out in Section 63.1-196 of the Code of Virginia: A facility operated by an agent of the Commonwealth, county, town, or city, acting within the scope of his authority as such;

7. Exception as set out in § 63.1-196.3 of the Code of Virginia: A child care center operated or conducted under the auspices of a religious institution may be exempted from licensure by filing specified information with the department. (Such a child care center is not statutorily prohibited from applying for a license from the department.)

PART II ADMINISTRATION

Article 1 Sponsorship

§ 2.1

Each center shall have a clearly identified sponsor.

§ 2.2

Sponsorship

A. When the center is sponsored by an individual proprietorship, the individual shall be the licensee.

B. When the center is sponsored by a partnership, the partnership shall serve as the licensee and develop a written agreement (articles of partnership) which allows operation and maintenance of a child care center.

C. When the center is sponsored by an unincorporated association, the association shall have a governing board which serves as the licensee and have a written set of by-laws and/or a written constitution which allows the operation and maintenance of a child care center.

D. When the center is sponsored by a corporation, the corporation shall have a governing board which serves as the licensee and have a charter or certificate of authority to transact business in the Commonwealth of Virginia, which allows operation and maintenance of a child care center.

§ 2.3

The sponsor, represented by the individual proprietor or by the officers and agents of a partnership, association, or corporation, shall be of good character and reputation; and shall not have been convicted of a felony or a misdemeanor related to abuse, neglect, or exploitation of children or adults.

§ 2.4

Posting of the License (§ 63.1-196(c) of the Code of Virginia)

The license shall be posted in a place conspicuous to the public, near the main entrance of the building(s), or the main office.

§ 2.5

Deceptive Representation or Advertisement (§ 63.1-196 (d) of the Code of Virginia)

No child care center "shall make, publish, disseminate, circulate, or place before the public or cause directly or indirectly, to be made . . . an advertisement of any sort regarding services or anything so offered to the public, which . . . contains any promise, assertion, representation, or statement of fact which is untrue, deceptive, or misleading."

Article 2 Operational Responsibilities

§ 2.6

The operational responsibilities of the licensee shall include, but not be limited to, the following:

1. to develop prior to acceptance of children a written statement of the purpose and scope of the services to be provided by the center and written policies under which the center will operate (Note: This requirement applies only to initial applications for licensure unless there is a significant change);

2. to ensure that the center's activities, services, and facilities are maintained in compliance with the Minimum Standards for Licensed Child Care Centers; with the terms of the current license issued by the department; with other relevant federal, state, or local laws and regulations; and with the center's own policies which are required by these standards;

3. to appoint and identify in writing an administrator to be responsible for the day-to-day operation and management of the center, except when the sponsor is an individual who serves as the administrator or partnership in which a partner serves as the administrator.

Article 3 Financial Responsibilities

§ 2.7

Section 63.1-198 of the Code of Virginia:

With an initial application for licensure, the applicant shall provide the department with the following evidence of financial responsibility:

1. a projected budget detailing expected income and expenses of the proposed center for the first year of operation; and

2. a complete balance sheet showing separately the current assets committed to, and current liabilities charged against, the proposed center.

   Note: Financial records may be requested pursuant to § 63.1-210 of the Code of Virginia.

§ 2.8

The center shall maintain public liability insurance for bodily injury with a minimum limit of at least $500,000 each occurrence/$500,000 aggregate. Evidence of insurance coverage shall be made available to the department's representative upon request.

§ 2.9

A plan of accident and/or school insurance shall be available to the parent. The center may designate whether the parent's participation in the plan is optional or mandatory.

Article 4 Record Keeping Responsibilities

§ 2.10

The licensee shall ensure that the center maintains a system of record keeping which complies with these standards.

§ 2.11

All children's records shall be treated confidentially.

EXCEPTION: Records shall be made available to the custodial parent or legal guardian upon request.

§ 2.12

Records shall be kept current.

§ 2.13

All records required by these standards for both children and personnel shall be retained at the center for one year after termination of enrollment or termination of employment, respectively, unless specified otherwise.

PART III PERSONNEL

Article 1 General Qualifications

§ 3.1

The following standards shall apply to all staff:

1. No staff shall have been convicted of a felony or a misdemeanor related to abuse, neglect, or exploitation of children or adults.
2. All staff shall understand and be sensitive to the varying capabilities, interests, needs, and problems of children in care.
3. All staff shall be:
   a. of good character and reputation;
   b. capable of carrying out assigned responsibilities;
   c. willing and able to accept training and supervision;
   d. able to communicate effectively both orally and in writing as applicable to the job responsibility; and
   e. able to understand and apply those standards in the Minimum Standards for Licensed Child Care Centers which relate to their respective responsibilities.

§ 3.2

All staff who work directly with children shall have the abilities to:

1. communicate effectively and appropriately with the age group to whom the staff person is assigned;
2. Provide a stimulating and safe environment for the age group to whom the staff person is assigned; and
3. use materials, activities, and experiences to encourage exploring, experimenting, and questioning.

§ 3.3

All staff who work in multiple positions within the center shall meet the qualifications of each position.

Note: Personnel titles used in the standards are descriptors only. Centers are not required to use the same titles.

§ 3.4

All staff who work directly with children shall be 18 years of age or over.

EXCEPTION: Aides may be under 18 but must be at least 14 years of age.

Article 2 Personnel Records

§ 3.5

Personnel records shall be kept for paid staff and volunteer personnel who begin work subsequent to April 1, 1986.

§ 3.6

Personnel records shall include the following:

1. the original application for employment or other written material providing:

   a. identifying information including name of staff person, beginning date of employment/volunteering, and job title;

   b. information needed to demonstrate that the individual possesses the qualifications contained in §§ 3.1 and 3.2 such as, but not limited to, interviews; observations; references; experience; and education related to the position; description of previous employment;

2. written documentation that references as to character and reputation as well as competency were checked with previous employers, if any, and/or

other knowledgeable and objective sources prior to employment or volunteering (e.g., letters of reference; notations of telephone reference checks including the name of the person(s) contacted, the date(s) of contact, the firm(s) contacted, and the results);

3. documentation of dates and participation in orientation, training, and staff development activities; and

4. date of termination, when applicable.

Article 3 Health Requirements

§ 3.7

Health information required by these standards shall be maintained for all staff (including the licensee, the administrator, and volunteer personnel) who come in contact with children or who handle food.

A. Initial Tuberculosis Examination and Report

1. Within 30 days before or 30 days after employment or contact with children, each staff person shall obtain an evaluation indicating the absence of tuberculosis in a communicable form.

   EXCEPTION: When a staff person terminates work at one licensed facility and begins work at another licensed facility with a gap in service of six months or less, the previous statement of tuberculosis screening may be transferred to the second facility.

2. Each staff person shall submit a statement that he is free of tuberculosis in a communicable form. This statement shall include the following:

   a. the type(s) of test(s) used and the test result(s),

   b. the date of the statement, and

   c. the signature of the physician, the physician's designee, or an official of a local health department.

B. Subsequent Evaluations

Any staff person who comes in contact with a known case of tuberculosis or who develops chronic respiratory symptoms shall within one month after exposure/development receive an evaluation in accordance with subsection A of § 3.7.

§ 3.8

At the request of the licensee/administrator of the facility or the Department of Social Services, a report of examination by a physician shall be obtained when there are indications that the safety of children in care may be jeopardized by the physical or mental health of a specific staff person.

§ 3.9

Any staff person who, upon examination or as a result of tests, shows indication of a physical or mental condition which may jeopardize the safety of children in care or which would prevent performance of duties:

1. shall be removed immediately from contact with children or food served to children and
2. shall not be allowed contact with children or food served to children until the condition is cleared to the satisfaction of the examining physician as evidence by a signed, dated statement from the physician.

Article 4 Staff Training

§ 3.10

Prior to assuming job responsibility all staff shall receive training in:

1. their individual responsibilities in the event of fire, including the location and operation of any fire extinguishers and fire alarm boxes;

2. their individual responsibilities in the event of a child's illness or injury, including the location and use of the first aid kit.

§ 3.11

Orientation

Staff who work with children shall receive training in the following topics no later than one week after starting employment or volunteer work:

1. the purpose and services provided by the center;
2. the policies and procedures of the center as these relate to the staff person's responsibilities;
3. procedures for reporting suspected child abuse or neglect to the appropriate local department of social services (Note: § 63.1-248.3 of the Code of Virginia requires any person providing full or part-time child care for pay on a regularly planned basis to report suspected child abuse or neglect.);
4. confidential treatment of personal information about children in care and their families;
5. the Minimum Standards for Licensed Child Care Centers as related to the staff person's responsibilities.

§ 3.12

Staff Development

A. On an annual basis employed staff who work directly with children shall attend at least eight hours of staff development activites which shall consist of in-service training programs, workshops, or conferences closely related to group care of children.

B. There shall be at least one staff person on duty at all times who has obtained instruction in performing the daily health observation of children from a

physician, registered nurse, or health department medical personnel. This instruction shall be obtained at three year intervals.

EXCEPTION: At least one staff person must receive this instruction prior to the initial opening of a center. Within six months of initial licensure, the new center shall comply fully with subsection B of § 3.12.

Article 5 Administrative Staff

§ 3.13

During the center's hours of operation, one adult on the premises shall be in charge of the administration of the center. This person shall be either the administrator or an adult appointed by the licensee or designated by the administrator.

Article 6 Program Staff

§ 3.14

Each person serving in the positions of program director, assistant program director, or child care supervisor shall not be responsible for the individual supervision of more than two aides.

§ 3.15

Program Director and Assistant Program Director

A. Responsibilities

There shall be one person responsible for the center's program which shall include, but not be limited to, the following areas:

1. the content of the program offered to the children in care;

2. programmatic functions, including orientation, training, and scheduling of all staff who directly supervise children, whether or not the program director personally performs these functions; and

3. management of the supervision provided to all staff who directly supervise children, whether or not the program director individually supervises such staff.

B. Qualifications

1. All program Directors hired or promoted after April 1, 1986 shall meet one of the following sets of qualifications:

a. forty-eight semester hours or 72 quarter hours of college credits of which 12 semester hours or 18 quarter hours are in Early Childhood Education, Child Development, or other subjects relating to group care of children, and one year of programmatic experience in a child care center or nursery school; OR

b. forty-eight semester hours or 72 quarter hours of college credits and two years of programmatic experience in a child care center or nursery school.

c. Allowable substitutions

(1) A maximum of nine Continuing Education Units (C.E.U.'s) will be accepted in lieu of sex semester hours or nine quarter hours of college credits.

(2) The Child Development Associate Credential (C.D.A.) may be substituted for 12 semester or 18 quarter hours of college credits or the C.D.A. may be substituted for the required courses.

d. Verification of qualifications shall be available to the Commissioner's representative upon request.

C. If the program director is present in the center less than four hours per day, there shall be an officially designated assistant program director who shall assume responsibility in the absence of the program director. In this situation, the assistant program di-

rector shall meet the qualifications described in paragraph one of subsection B of § 3.15.

§ 3.16

Child Care Supervisor

Individuals working in this capacity are responsibile for program implementation and direct supervision of children. Child care supervisors hired or promoted after April 1, 1986 shall have one of the following qualifications:

1. C.D.A. (Child Development Associate Credential); or
2. high school diploma or G.E.D. and one year of programmatic experience in group care for children; or
3. three years programmatic experience in a child care center or nursery school.

§ 3.17

Aides

A. Aides may be under 18 but must be at least 14 years of age.

B. Individuals working in this capacity are assigned to assist the child care supervisor in program implementation and supervision of children.

C. An aid who is under the age of 16 years may work with a group of children only under the direct individual supervision and in the presence of a staff member who meets the qualifications of the program director or child care supervisor. An aide under the age of 16 shall not be left in charge of a group of children.

Article 7 Volunteers and Volunteer Personnel

Note: Volunteers are persons who come to the center less than once a week and are not counted toward the re-

quired number of staff. Volunteer personnel are persons who come to the center once a week or more often or who are counted toward the required number of staff in §§ 4.1, 4.2, or 4.7. Volunteer personnel shall meet the personnel and health requirements for the applicable position.

§ 3.18

All volunteers and volunteer personnel shall be under the individual supervision of an individual who meets the qualifications of a program director, or child care supervisor.

§ 3.19

The duties of volunteers shall be clearly defined.

PART IV SUPERVISION

Article 1 General Supervision

§ 4.1

There shall be at least two staff at the center and on field trips at all times when one or more children are present. One of these shall meet the qualifications of the program director or child care supervisor.

§ 4.2

When the outdoor activity area is not adjacent to the center, there shall be at least two staff on the outdoor activity area whenever one or more children are present.

§ 4.3

A child shall be greeted upon arrival at the center each day by a staff person. If possible, the same staff person shall greet the child each day.

§ 4.4

A written record of children in attendance each day shall be maintained at the center.

§ 4.5

Children shall be supervised (i.e., within sight and sound) at all times, except that staff need only be able to hear a child who is using the bathroom. Staff shall check on a child who has not returned from the bathroom after five minutes.

Article 2 Staff to Children Ratio Requirements

§ 4.6

Staff shall be counted in the required staff to children ratios only for periods of time when they are directly supervising children.

EXCEPTION: Aides who are under the age of 16 years shall not be counted in determining the required ratios of staff to children.

§ 4.7

The following ratios of staff to children are required whenever children are on the premises of the center, or on the outdoor activity area, and during all field trips provided by the center.

1. for children from birth to the age of 16 months: one staff person for every four children;
2. for children 16 months old to two years: one staff person for every five children;
3. for children from two years to four years: one staff person for every ten children;
4. for children from four years to the age of eligibility to attend public school: one staff person for every 12 children;
5. for children from the age of eligibility to attend public school and older: one staff person for every 20 children.

§ 4.8

When children are regularly in ongoing mixed age groups, the staff to children ration applicable to the youngest child in the group shall apply to the entire group.

Note: For children over the age of two, the transition period up to one hour after opening and one hour before closing is not considered a regular and ongoing mixed age group period. A ratio of one staff person to every 24 children with each preschool age child counting as two children shall apply during the transition period.

Article 3 Ratio During Rest Periods

§ 4.9

During designated rest or sleeping periods for preschool age children, the ratio of staff to children is permitted to be double the number of children to each staff required in subsection 3 and 4 of § 4.7 provided that:

1. a staff person is within the room and within sight and sound of the resting/sleeping children;
2. all staff counted in the overall naptime ratio shall be within the center and available to assure safe evacuation in an emergency; and
3. an additional person is present at the center to assist, if necessary.

EXCEPTION: In a mixed age group of preschoolers, double the number of children to each staff applicable to the youngest child shall apply.

Article 4 Supervision of Children During Swimming & Wading Activities

§ 4.10

The staff ratios required by Article 2 shall be maintained while children are using the swimming and wading pools.

§ 4.11

If a pool exceeds two feet of water in depth, a Water Safety Instructor or Senior Life Saver holding a current certificate by an organization such as, but not limited to, the Red Cross shall be on duty supervising the children at the pool at all times when one or more children are in the pool.

§ 4.12

A minimum of two people employed by the center must be on duty supervising the children at the pool at all times when one or more children are in the pool.

PART V PHYSICAL ENVIRONMENT

A center must provide an environment which protects the children from physical harm but is not so restrictive as to inhibit physical, intellectual, emotional, or social development.

Article 1 Safety, Health, and Comfort

§ 5.1

No child care center shall be located where conditions exist that would be hazardous to the physical health and safety of children.

§ 5.2

All equipment and areas inside and outside the center including the grounds shall be well maintained, in safe condition, and free from safety hazards.

§ 5.3

Building Construction and Maintenance

A. If space used or planned for use by the center is rennovated or altered, the plans shall be submitted to the Department for review prior to the expected change.

B. Prior to beginning operation and prior to use of newly constructed, renovated, remodeled, or altered buildings or sections of buildings, written documentation of the following shall be provided:

1. inspection and approval of the building(s) from the local building official or the Office of the State Fire Marshal, whichever is applicable, or approval of a plan of correction;

2. inspection and approval from the local Health Department, or approval of a plan of correction, for meeting:

a. sanitation and health;

b. water supply;

c. sewerage system;

d. food service.

3. inspection and approval from the local fire department that the center is free from fire hazards or approval of a plan of correction; and

4. inspection and approval from the administrator of local child care ordinances, or approval of a plan of correction.

C. At the time of a renewal application, written documentation of annual approval, or approval of a plan of correction, shall be provided from:

1. the Office of the State Fire Marshal, if applicable;

2. the local health department;

3. the local fire department; and

4. the local administrator of any applicable child care ordinance.

§ 5.4

Grounds

A. There shall be a safe area for arrival and departure of children.

EXCEPTION: Centers licensed prior to April 1, 1986, which are unable to provide this safe area shall provide parents with procedures for protecting children from traffic and other hazards during arrival and departure.

B. There shall be outside lighting at entrances and exits used by children to protect against injuries when the center operates before sunrise or after sundown.

C. Outside sand in self-contained boxes with bottoms which prevent drainage shall be covered when not in use.

§ 5.5

Sanitation

A. Cleanliness of the facility and all of its furnishings and equipment shall be maintained.

B. The facility shall be free from insects, rodents, and other pests.

C. Drinking water shall be available at all times.

D. Drinking fountains, if used, shall be of a type approved by the local health department.

E. Individual disposable cups shall be provided for drinking water when fountains are not used.

F. All disposable products shall be used once and discarded.

G. Personal Articles

If combs, toothbrushes, wash cloths, or cloth towels are used, they shall be individually assigned.

§ 5.6 –

Lighting

Areas used by children shall be adequately lighted for safety and for the activity taking place.

§ 5.7

Temperature and Ventilation

A. Areas used by children shall be well ventilated and dry.

B. Except for windows or doors used for fire exits, screens shall cover any windows or doors opened for ventilation.

EXCEPTION: For centers licensed prior to April 1, 1986, this requirement does not apply to jalousied windows which open into and out of the window frame at such a depth that they cannot be screened.

C. Fans shall be placed at a height out of the reach of children or shall be placed in a room to which children do not have access.

D. The center shall use a portable thermometer for measuring temperature in areas used by children.

E. In areas used by children, temperature shall be maintained no lower than 68 degrees Fahrenheit.

F. In centers or areas of centers serving infants, toddlers, or preschoolers, the temperature maintained shall be based on a measurement at one to two feet from the floor.

§ 5.8

Equipment and Materials

A. Equipment and play materials shall be durable and free from characteristics that may be hazardous or injurious to children such as, but not limited to, sharp, rough edges; toxic paint; and objects small enough to be swallowed.

B. Steps used by the children and consisting of three or more risers shall be equipped with handrails within the normal handgrasp of the children or a banister with vertical posts, between the handrail and each step, which can be safely grasped by the children.

C. Windows, exterior doors, stairways, walkways, and openings, such as cellars and window wells, or other potential sources of injury or harm to children shall be equipped with safeguards such as, but not limited to, screens, gates, and/or handrails.

D. All electrical outlets in areas used by children shall have protective caps or other equivalent, protective devices approved by an electrical safety authority recognized by the Department.

E. Cleaning fluids and other harmful household agents

1. Such substances shall be stored in containers that clearly indicate their contents.

2. If such substances are not kept in original containers, the substitute containers shall not resemble food or beverage containers.

3. Such substances shall be kept in a locked place using a safe locking method that cannot be unlocked by children.

4. If a key is used, the key shall be placed out of the reach of children.

Article 2 Space, Furnishings, Equipment, and Materials

§ 5.9

Group Activity Areas

A. Calculation of Activity Space

1. Centers shall have a minimum of 25 square feet of available activity space per child and 200 cubic feet of air space per child. Space in areas used by

infants and toddlers shall be calculated separately from space for older children.

Note: Activity space includes equipment used during activities.

2. Areas not routinely used for children's activities shall not be calculated as available activity space. Space not calculated shall include, but not be limited to, offices; hallways; bathrooms; kitchens; storage rooms/closets; and space occupied by cribs, changing tables, or equipment which is not used in or does not contribute to the children's activities.

B. Centers shall have equipment and materials which are suitable and appropriate to the developmental stages of the children, in sufficient supply, and accessible to children for activities required by these standards.

C. Areas shall be provided where equipment and materials can be readily used by children during active play periods.

D. When playing on the floor, children at each developmental stage shall be protected from children at more advanced developmental stages.

E. Tables and chairs in a quiet area shall be available for school age children who wish to study.

F. An activity area shall be available for school age children which is separate from that assigned for the use of younger children.

G. Outdoor Activity Space

1. Centers shall use a clean, safe outdoor activity area, either adjoining or accessible to the center, which shall provide a minimum of 75 square feet of space per child on the outdoor area at any other time.

2. The outdoor activity area for children shall include an unpaved space such as, but not limited to, grass or indoor/outdoor carpet.

3. Sufficient, suitable, age-appropriate outdoor play equipment shall be provided for children using the outdoor activity area and shall be safely maintained.

H. Swimming and Wading Pools

1. When permanent swimming or wading pools are located on the premises of the center the following standards shall apply:

a. All pools constructed, renovated, or remodeled after July, 1976 shall have a statement of their inspection and approval from the State Health Department and the local administrator.

b. All pools constructed, renovated, or remodeled after April 1, 1986 shall have a statement in writing of their inspection and approval from the local building official.

c. Outdoor swimming pools shall be enclosed by safety fences and gates which shall be kept locked when the pool is not in use.

d. Entrances to indoor swimming pools shall be locked when the pool is not in use.

e. Written safety rules shall be posted at the pool.

2. When swimming or wading is provided as a part of the center program in either on-site or off-site pools, the following standards apply:

a. The center shall maintain written, signed permission from the parent of each child who participates in swimming or wading.

b. The center shall distribute written safety rules to center staff and to parents of participating children.

c. If portable wading pools are used, they shall be emptied of dirty water and filled with clean water for each day's use, and more frequently if necessary.

§ 5.10

Areas for Sleep and Rest

A. No more than one child at a time shall use a crib, cot, mat, or bed.

B. A separate crib, cot, bed, or mat, according to the age of the child, shall be assigned to each child who is regularly in attendance at naptime or bedtime.

C. Cribs, cots, mats, and beds shall be marked or identified in some way for use by a specific child.

D. Double decker cribs, cots, or beds shall not be used.

E. Children under the age of 24 months shall be provided separate sleeping areas from those children 24 months and over.

F. Cribs

1. Cribs must be used for children under 12 months of age and for children over 12 months of age who are not developmentally ready to sleep on a cot.

2. Crib sides shall always be up and the fastenings secured when a child is in the crib, except when staff is giving the child immediate attention.

3. When cribs with slats are used by the center, there shall be no more than six centimeters or 2⅜ inches of space between slats.

G. Mats may be used by school age children only.

1. Mats shall be at least 22 inches wide and 39 inches long and shall be covered with a waterproof material that is readily cleanable, such as vinyl.

2. Mats shall be at least one inch thick.

H. Evening and Overnight

1. For evening care, beds with mattresses or cots with at least a one inch foam rubber pad shall be provided for children not required to sleep in cribs.

2. For overnight care, beds with mattresses or cots with at least a two inch foam rubber pad shall be required for children not required to sleep in cribs.

3. For overnight care which occurs for a child on a regular and ongoing basis, beds with mattresses shall be required.

4. For evening and overnight care, separate sleeping areas shall be provided for children of the opposite sex 10 years of age and older.

5. When sleeping garments are used, they shall be clean, comfortable, and plainly marked for individual use.

I. Required Bed Linens

1. Required bed linens for cribs, cots, mats, or beds shall consist of a top cover and a bottom cover or a one-piece covering which is open on three edges.

2. Mattresses when used shall be covered with a waterproof material which can be easily sanitized such as, but not limited to, vinyl or a nonfilm type polyethylene material.

J. Pillows

1. When used, pillows shall be assigned for individual use and covered with pillow cases.

2. Pillows shall not be used by children under two years of age.

K. Arrangements of Cribs, Cots, Mats and Beds

1. When one or more children are scheduled to enter or leave the center while other children are

resting or sleeping, the cribs, cots, mats, or beds shall be placed so that the resting or sleeping children are not disturbed by the arriving or departing children.

2. Occupied cribs, cots, mats, and beds shall be at least 2½ feet from radiators in use.

3. There shall be at least 30 inches of space between service sides of occupied cribs and other furniture when that space is the walkway for staff to gain access to any child in any crib.

4. There shall be at least 12 inches of space between the sides and ends of occupied cribs except where they touch the wall.

5. Cots, beds, or mats shall be placed so that children can get on and off their cots, beds, or mats without being hampered in their movement.

a. There shall be at least 15 inches of space between sides and ends of occupied cots, beds, and mats.

b. Fifteen inches of space are not required where cots, beds, or mats touch the wall or where screens are placed between cots or beds as long as one side is open at all times to allow for passage.

§ 5.11

Quiet, Private Area

There shall be a separate area for children who are ill, injured, or emotionally upset.

§ 5.12

Bathroom Facilities

A. Bathroom areas shall be equipped with sinks with heated and cold running water, soap, paper towels, toilets, and toilet paper.

B. All toilets counted for children shall be the standard flush type, accessible, and within the same building as the children.

C. Urinals may be substituted for not more than one-half the required number of toilets, provided the center has at least two toilets.

D. An adult size toilet with privacy shall be provided for staff use. The staff toilet may be counted in the number of required toilets for children only if children are permitted unrestricted access to them on a routine basis.

E. When child size toilets, urinals, and low sinks are not available in bathrooms used by preschool children, at least one platform or set of steps will be available so that preschool children may use adult size toilets and sinks without assistance or undue delay.

F. In overnight care, an operational tub or shower shall be provided for children over 24 months to bathe.

G. Required Number of Toilets and Sinks

1. The center shall have one toilet and one sink for every 15 preschool children and one toilet and one sink for every 30 school age children.

2. In centers or portions of centers licensed for school age children, at least one toilet shall be individually enclosed for privacy in any bathroom which contains more than one toilet.

3. For centers licensed for 30 or fewer school age children, only school age children of the same sex may occupy the bathrooms at the same time.

4. For centers licensed for more than 30 school age children, separate bathrooms shall be provided for school age children of the opposite sex.

H. Diapering and Toilet Training Areas

1. In centers serving children who are not completely toilet trained, there shall be a diapering center in each area or immediately accessible to each area designated for children not toilet trained. To be considered immediately accessible, the diapering center must be located in a room which opens directly into the area for children. The diapering center shall contain:

a. a sink with heated and cold running water and a nonabsorbent changing surface;

b. a step-on diaper pail with leak-proof disposable liners or equivalent equipment which does not require the top of the pail to be touched by hand when discarding diapers. If both cloth and disposable diapers are used, there shall be one such pail for each type; and

c. a covered receptacle for soiled bed linens and nondisposable wash cloths.

2. For every 10 children in the process of being toilet trained there shall be one toilet chair, OR one child-sized toilet, OR one adult sized toilet with a platform or steps and an available adapter seat. These items shall either be located in the area used for the majority of the day by the children being toilet trained OR the immediately accessible area (see § 5.10.H.1).

3. When only toilet chairs are used, there shall be a toilet located in an area or room in which the door is not more than 10 feet from the area used for the majority of the day by the children being toilet trained.

§ 5.13

Food Service Areas

A. Eating utensils and dishes shall be appropriate to the sizes, developmental stages, and physical dexterity of the children served.

B. Disposable dishes and utensils shall be sturdy enough to contain food without leakage and to prevent harm and injury to children.

C. High chairs, infant carrier seats, or feeding tables shall be used for children under 12 months who are not held while being fed.

D. Sturdy chairs and tables appropriate to the sizes of the children shall be used at mealtime.

§ 5.14

Storage

A. There shall be individual storage space such as, but not limited to, lockers or cubbies for each child's clothing and personal items.

B. There shall be storage space accessible to the children for equipment and materials used by them.

PART VI PROGRAMS AND SERVICES

Article 1 Admission Policies and Procedures

§ 6.1

Identifying Information for Each Child

A. Each center shall maintain and keep at the center a separate record for each child.

B. Each child's record shall contain the following identifying information:

1. name, nickname (if any), sex, and birthdate of the child;

2. name, home address, and home telephone number of each parent who has custody;

3. work telephone number and place of employment of each parent who has custody;

4. name and telephone number of child's physician;

5. name, address, and telephone number of a designated person to call in an emergency if a parent cannot be reached;

6. names of persons authorized to pick up the child as well as those not permitted to pick up the child;

7. admission date;

8. enrollment termination date;

9. the child's grade level and the name of his school, where applicable.

C. Children under 12 months of age shall have their name identified on some item attached to their person or their clothing. Necklaces and pins shall not be used.

§ 6.2

Agreements/Authorizations

A. A written agreement between the parent and the center shall be in each child's record at the time of the child's admission. The agreement shall include:

1. an authorization for emergency medical care if an emergency occurs when the parent cannot be located immediately;

2. a statement that the center will notify the parent when the child becomes ill and that the parent will arrange to have the child picked up as soon as possible.

B. Written permission from the parent authorizing the child's participation in center field trips shall be in the child's record.

C. One of the following two methods of obtaining permission for field trip participation shall be used:

1. Separate written permission shall be secured for each field trip.

OR

2. Written permission for all center field trips that occur while the child is enrolled in the center shall be secured. In addition, the parent must be informed in advance of each planned field trip and be given the opportunity to withdraw his child(ren) from a field trip.

D. If a parent wishes a child to leave the center unaccompanied, written permission from the parent authorizing the child to leave the center shall be secured.

E. The center shall not release a child to any person without the parent's consent.

§ 6.3

Assessment and Initial Plan of Care

A. Prior to the child's admission there shall be a personal interview at the center with a staff person, the parent, and the child unless there are unusual circumstances which preclude having the child present for the initial interview.

Note: The purpose of the interview is to provide the opportunity for the parent and staff to exchange information and arrive at a joint decision about the admission of the child.

B. Prior to the child's admission, the center shall inform the parent of:

1. fees and tuition, and

2. the program and activities provided.

C. Prior to the child's admission, the center shall provide written information to the parent regarding the following:

1. admission and enrollment termination policies, including the amount of notice required from the parent and the center prior to termination of enrollment.

2. hours and days of operation, including holidays and other closures;

3. the center's definition of acceptable and unacceptable discipline methods;

4. transportation safety policies, when transportation is provided;

5. food policies.

§ 6.4

Physical Examinations/Immunizations

A. Timing and Frequency of Medical Reports

1. Immunizations

Section 22.1-271.2 of the Code of Virginia requires that documentation of all immunizations received be obtained prior to each child's admission to a child care center required to be licensed by this Commonwealth.

EXCEPTION (§ 22.1-271.2C) of the Code of Virginia: Documentation of immunizations is not required for any child whose parent submits an affidavit to the center, on the form entitled "Certificate of Religious Exemption", stating that the administration of immunizing agents conflicts with the parent's or child's religious tenets or practices.

2. Physical Examination

Each child shall have a physical examination by or under the direction of a physician, prior to admission or within one month after admission. The schedules for examinations prior to admission for different age groups are listed below:

a. within two months prior to admission for children six months of age and younger;

b. within three months prior to admission for children aged seven months through 18 months;

c. within six months prior to admission for children aged 19 months through 24 months;

d. within 12 months prior to admission for children two years of age through five years of age;

e. within two years prior to admission for children six years of age and above.

EXCEPTIONS:

(1) Children transferring from a facility licensed by the Virginia Department of Social Services, certified by a local department of public welfare/social services, or approved by a licensed Family Day Care System:

If the initial report or a copy of the initial report of immunizations is available to the admitting facility, no additional examination is required. If the initial report or a copy of the initial report is not available, a report of physical examination and immunizations is required in accordance with subsections A and B of § 6.4.

(2) (§ 22.1-270D of the Code of Virginia): Physical examinations are not required for any child whose parent objects on religious grounds. The parent must submit a signed statement noting that the parent objects on religious grounds and certifying that to the best of the parent's knowledge the child is in good health and free from communicable or contagious disease.

B. Form and Content of Medical Reports

1. The current form required by the Virginia Department of Health shall be used to report immunizations received and the results of the required physical examination.

EXCEPTION: When the current Health Department form has not been used such as, but not limited to, when a child transfers from another state, other documentary proof of the child having received the required examination and immunizations shall be accepted. Documentary proof may include, but not be limited to, an International Certificate of Immunization, another state's immunization form, or a physician's letterhead.

2. Each report shall include the date of the physical examination and dates immunizations were received.

3. Each report shall be signed by a physician, his designee, or an official of a local health department.

4. Each report shall be filed at the center during the child's enrollment.

Article 2 Health Care

§ 6.5

Medical Reports after Admission

A. Updated information on immunizations received shall be obtained once every six months for children under the age of two years.

B. Updated information on immunizations received shall be obtained once between each child's fourth and fifth birthdays.

C. These medical reports shall meet the form and content requirements under subsection B of § 6.4.

§ 6.6

Medication

A. Prescription and nonprescription medication shall be given to a child only with written authorization from the parent.

B. The authorization for administering any medication shall be effective for a limited time period not to exceed ten work days, unless otherwise prescribed by a physician, and shall be retained on file at the center during the effective period.

C. All medication shall be labeled with the child's name, the name of the medication, the dosage amount, and the time(s) to be administered.

D. Prescription medication shall be in the original container with the prescription label affixed.

E. All medication shall be kept in a designated locked place or a refrigerator inaccessible to children.

F. Prescription and nonprescription medication shall be returned to the parent as soon as the medication is no longer being administered.

§ 6.7

Special Care Provisions to Prevent the Spread of Disease

A. Staff with training as required in subsection B of § 3.12 shall observe each child daily for signs and symptoms of illness.

B. If a child has signs or symptoms of a communicable disease or has a diagnosed communicable disease, arrangements shall be made for the child to leave the center as soon as possible after the signs or symptoms are noticed.

C. A child showing signs or symptoms of a communicable disease shall remain in the designated quiet, private area until leaving the center.

D. When a child has been exposed to a communicable disease while attending the center, the parent shall be notified at the end of the day.

E. The current edition of the Communicable Disease Chart, available from the State Department of Health

or Department of Social Services, shall be posted in the center.

F. The current Communicable Disease Chart recommendations for the exclusion of sick children from the center shall be followed. (Refer to Communicable Disease Chart in Appendix.)

G. If a child's clothing becomes wet or soiled, it shall be changed immediately.

H. Children's hands shall be washed with soap and warm water prior to eating meals or snacks and after toileting.

I. Staff Procedures for Diapering and Toileting

1. Diapers shall be changed on a non-absorbent changing surface which shall be washed with soap and warm water after each use. A disposable paper sheet which is discarded after each diapering may be used in lieu of washing the nonabsorbent changing surface after each use.

2. A child's diapers shall not be changed in a crib.

3. The child's genital area shall be thoroughly cleaned during each diapering.

4. Staff shall wash their hands with soap and warm water after each diaper change and after helping a child with toileting.

5. Cloth wash cloths used in diaper changes shall be used once and laundered before being used again.

6. Toilet chairs shall be emptied promptly after each use.

J. Laundering of Bed Linens

1. Crib sheets for children under 12 months of age shall be changed at least once a day and whenever soiled.

2. Bed linens for children 12 months of age and older shall be changed at least once per week and whenever soiled.

3. Bed linens shall be assigned for a child's individual use and shall be laundered before being used by another child.

4. Pillow cases shall be assigned for individual use. Pillow cases shall be laundered before being used by another child and changed at least weekly and whenever soiled.

Article 3 Communication with Parents

§ 6.8

There shall be regular, planned communication between the center and the parent about the progress, adjustment, and needs of the child.

§ 6.9

When a center decides to terminate the enrollment of a child, the center shall inform the parent of the reason(s) for termination.

§ 6.10

The center shall encourage parental involvement on a volunteer basis in any appropriate center activities.

§ 6.11

The center shall be open for parents to visit and observe their children at any time. (§ 63.1-210.1 of the Code of Virginia).

§ 6.12

Parents shall be informed of exceptional behavior which is unusual for the child or for the chronological age of the child.

§ 6.13

For each child under 18 months, the center shall post a daily record which can be easily seen by both the parent and by the staff working with the children. The record shall include the following information:

1. the amount of time the child slept;
2. the amount of food consumed and the time;
3. a description and the time of irregular bowel movements;
4. developmental milestones.

Article 4 Management of Behavior

§ 6.14

Acceptable and unacceptable methods of discipline shall be defined in a written policy.

§ 6.15

Staff shall know and adhere to the center's policy on acceptable and unacceptable discipline methods.

§ 6.16

Expected behavior shall be on the child's developmental level.

§ 6.17

Limits or rules shall be appropriate and understandable to the children to whom they apply.

§ 6.18

Discipline shall be fair and consistently applied.

§ 6.19

Discipline shall be appropriate to the infraction and timely.

§ 6.20

There shall be no physical punishment or disciplinary action administered to the body such as, but not limited to, spanking; forcing a child to assume an uncomfortable position (e.g., standing on one foot, keeping arms raised above or horizontal to the body); restraining to restrict movement through binding or tying; enclosing in a confined space, box, or similar cubicle; or using exercise as punishment.

§ 6.21

Children shall not be shaken at any time.

§ 6.22

The center shall neither force nor withhold food, neither force nor withhold naps, nor punish toileting accidents in disciplining the child.

§ 6.23

Staff shall not be verbally abusive which would include, but not be limited to, threats or belittling remarks about any child or the family.

Article 5 Nutrition and Food Services

§ 6.24

Meals and Snacks

A. Meals and snacks shall be provided by the center or catered, according to the following requirements:

1. Centers open morning through afternoon shall serve a morning snack, a midday meal, and an afternoon snack.

2. Centers open part of the day shall serve appropriate snacks and/or meals, based on their hours of operation; e.g., a center open only for after school care must serve an afternoon snack; a center open from seven a.m. to one p.m. must serve a morning

snack and midday meal; a center offering evening or overnight care shall serve a snack.

3. Children who have not eaten an evening meal before they are admitted to the center for evening and/or overnight care shall be served one.

4. Children shall be served any meals or snacks scheduled for the period during which they are present in the center.

5. There shall be a period of at least 1½ hours between each meal or snack service.

6. Meals and snacks shall meet the nutritional needs of children as established by a recognized authority such as the Child Care Food Program of the U.S. Department of Agriculture as listed in the charts found in Appendix II.

7. Meals and snacks shall provide opportunities for children to learn to eat and enjoy a variety of nutritious foods. Three sources of Vitamin A shall be served each week as listed in the chart found in Appendix III.

8. The Center shall not serve junk foods and empty calorie foods as part of a meal or required snack such as, but not limited to:

a. soda water and carbonated drinks, sweetened water-based beverages, tea, and coffee;

b. candies—hard sugar, fondants (i.e., caramels, chocolate, etc.), spun sugar;

c. gum;

d. caramel corn.

9. Potato chips, corn chips, cookies, and cake may be served only with a nutritionally balanced meal and may not be served alone as a required snack.

10. Menus

a. A menu listing all meals and snacks to be served by the center during the current one week period shall be dated and posted in a location conspicuous to parents or distributed to parents.

b. Posted menus shall indicate substitutions.

c. Menus shall be retained at the center for one month.

11. The center shall serve portions appropriate for the age, nutritional needs, and stages of development of the children. (Refer to USDA chart in Appendix)

12. Children shall be permitted to have additional servings.

B. The center may choose to permit parents to provide any of the following categories of food:

1. special diets for religious or medical reasons;

2. infant formulas;

3. baby food;

4. breakfasts;

5. snacks;

6. beverages and foods for celebrations and field trips;

7. mid-day meals for school age children only.

C. If the center chooses to permit parents to provide food, it shall provide parents with a copy of written policies and procedures which shall address:

1. when and under what conditions food may be brought from home;

2. procedures for stocking and supplying food from the center to a child whose food is lost or becomes inedible or is inadequate in nutrition or quantity;

3. procedures used by both parents and the center to protect against food contamination and spoilage; and

4. procedures used by both parents and the center to prevent children from eating food brought by other children, unless the food is intended to be shared, such as food brought for a celebration.

D. If the center permits parents to bring food from home, all unused portions shall be discarded or returned to parents at the end of each day.

§ 6.25

Special Food Service Needs

Special diets for individual children shall be provided by the center or brought from home.

§ 6.26

Infant and Toddler Food Service Needs

A. Infants shall be fed on demand unless parents provide other written instruction.

B. Prepared infant formula shall be refrigerated and clearly labeled with the child's first and last names.

C. Bottle fed infants who cannot hold their own bottles shall be picked up and held when fed. Bottles shall not be propped.

D. No child shall be allowed to drink from a bottle while lying down or while walking around.

E. Formula, bottled breast milk, and baby food not consumed by an infant may be used later in the same day, if dated and stored in the refrigerator; otherwise, it shall be discarded or returned to the parent at the end of the day.

F. The record of each child on formula shall contain:

1. the brand of formula;

2. the child's feeding schedule; and

3. a statement signed by the parent noting any type(s) of commercial formula which may not be used in an emergency.

G. A one-day's emergency supply of disposable bottles, nipples, and commercial formulas appropriate for the children in care shall be maintained at the center.

H. Upon request, mothers shall be allowed to breastfeed their infants at the center.

I. Staff shall feed semi-solid food with a spoon.

EXCEPTION: Infant feeders such as, but not limited to, the plunger type feeding device shall not be used except with written authorization and instructions from the child's physician.

J. Children shall be encouraged to feed themselves according to their developmental readiness.

K. Drinking water shall be offered at regular intervals to infants and toddlers.

L. Children using infant seats or high chairs shall be carefully supervised during snacks or meals. When a child is placed in an infant seat, the protective belt shall be fastened securely.

§ 6.27

Contract Food Services

A. If a catering service is used, it shall be approved by the local Health Department.

B. A copy of the current contract shall be made available to the Department's representative upon request.

Article 6 Resting

§ 6.28

The daily program for children shall provide experiences which promote growth, well-being, and the age-appropriate development of gross and fine motor skills; language skills; cognitive skills; social and emotional skills; positive self-concept, curiosity, interest, and exploration.

§ 6.29

There shall be a routine yet flexible schedule so that children have the security of knowing the sequence of daily activities.

A. The written schedule shall be available to parents upon request.

B. The daily schedule shall be retained for one month.

§ 6.30

Activities shall be geared to the ages and developmental levels of the children served.

§ 6.31

A mix of materials and activities both group and individual, active and quiet shall be provided.

§ 6.32

Outdoor activity shall be provided daily, weather permitting.

A. Centers operating five hours or more per day shall have at least one hour of outdoor activity per day which shall be divided between morning and afternoon.

B. Centers operating less than five hours per day shall have a brief outdoor recess in the morning or afternoon.

9. Gross Motor Activities—For example: climbing; balancing on steps, balance board; playing hopscotch; jumping rope; riding on or rolling transportation toys; throwing bean bags, rubber and non-toxic balls; play with punching bags; digging; reaching.

   Note: Many activities provide the opportunity to combine several of the interest areas above. For example, a center may make a collage of fall leaves combining 1 and 4. Many of the manipulative and fine motor activities could be the same, etc.

§ 6.35

School Age Activities

A. Children in kindergarten and first grade may be allowed to participate in activities with preschool children.

B. Activities for school age children shall include, but not be limited to, arts, crafts, organized games or sports, reading, field trips, outdoor play.

§ 6.36

Evening and Overnight Care Activities

Activities for children in evening or overnight care shall include (as time allows) age-appropriate activities described in § 6.34. Quiet activities and experiences shall be available immediately prior to bedtime.

Article 7 Activities

§ 6.37

Children of all ages shall be allowed to rest or sleep as needed on cots, beds, or mats.

§ 6.38

Resting or sleeping infants and toddlers shall be checked at least every 30 minutes.

§ 6.39

Centers operating five or more hours per day shall have a designated rest period for preschool children in attendance at the time of the rest period.

A. The designated rest period shall be at least one hour but no longer than two hours unless children are actually sleeping.

B. Cots or beds shall be used during the designated rest period.

PART VII EMERGENCIES

Article 1 Specialized Staff Training

§ 7.1

There shall be at least one staff person on the premises during all hours of operation who has received within the past three years a basic certificate in standard first aid (Multi-Media, Personal Safety, or Standard First Aid Modular) from a course approved by the American Red Cross.

Note: Centers that have licenses in effect on April 1, 1986 shall comply with this standard six months after the standards become effective for that facility.

Article 2 Equipment for Emergencies

§ 7.2

Each building of the center shall have a first aid kit which shall include at a minimum:

1. scissors;
2. tweezers;
3. gauze pads;
4. adhesive tape;
5. band-aids, assorted sizes;
6. an antiseptic cleansing solution;

7. an anti-bacterial ointment;
8. syrup of ipecac (to be used only upon the advice of the physician or the Poison Control Center);
9. bee sting preparation;
10. thermometer; and
11. triangular bandages.

§ 7.3

The first aid kit shall be stored so that it is not accessible to children but is easily accessible to staff.

§ 7.4

A first aid instuctional manual shall be kept with each first aid kit at all times.

§ 7.5

Heating Units

A. Gas stoves, coal stoves, wood stoves, oil stoves, portable electric heaters, kerosene heaters, and portable heating units of a similar nature shall not be used in the center, except in an emergency such as a power outage in cold weather.

B. When any of the above heating sources is used, physical barriers shall be erected to protect children from injuries.

C. Any heating units used in an emergency shall have been previously inspected and approved by the appropriate fire safety official.

Article 3 Procedures for Emergencies

§ 7.6

Emergency evacuation procedures shall be posted in a location conspicuous to staff and children in each building of the center.

§ 7.7

The center shall implement these procedures through monthly practice drills and shall maintain a record of the dates of the monthly emergency evacuation drills for one year.

§ 7.8

The following telephone numbers shall be posted in a conspicuous place near each telephone:

1. a physician or hospital;
2. an ambulance or rescue squad service;
3. the local fire department;
4. the local police department;

   Note: If there is a generic emergency number such as, but not limited to, 911 operable in the locality, that number may be posted in addition to the above numbers.

5. a regional poison control center.

§ 7.9

The center will notify the parent immediately in the event of a serious accident or injury and will notify the parents of a minor accident or injury at the end of the day. Written documentation of the type of injury, and method of notifying parents shall be kept on file at the center for one year after the injury or accident.

Note: Examples of a serious accident or injury might include unconsciousness; broken bones; deep cut requiring stitches; concussion; foreign object in eye, nose, or ear.

Examples of a minor accident or injury might include a small scratch, cut, or scrape; minor bruise or discoloration of the skin.

APPENDIX I

COMMUNICABLE DISEASE CHART

Communicable Disease Reference Chart For School Personnel

Disease	Incubation Period	Common Signs and Symptoms	Recommendations For Exclusion From School
Chickenpox (Varicella)	From 2 to 3 weeks, usually 13 to 17 days.	Sudden onset with slight fever and itchy eruptions which become vesicular (small blisters) within a few hours. Lesions commonly occur in successive crops, with several stages of maturity present at the same time.	Communicable for as long as 5 days before eruption of vesicles and for not more than 6 days after the appearance of the first crop of vesicles. *Case:* Exclude from school for 7 days after eruption. Avoid exposure to women in early pregnancy. *Contacts:* On appearance of first sign or symptom, exclude from school for 7 days.
Fifth Disease (Erythema Infectiosum)	From 6-14 days.	Mild illness without fever. Rash characterized by a vivid reddening of the skin especially of the face which fades and recurs; classically, described as a "slapped cheek appearance."	*Case:* Exclusion from school not required. *Contacts:* School exclusion not indicated.

German Measles (Rubella)	From 14 to 21 days, usually 16 to 18 days.	Mild symptoms; slight fever, rash of variable character lasting about 3 days; enlarged head and neck lymph glands common. Joint pain may occur especially in older children and adults.	Communicable for 7 days before onset of rash and at least 4 days thereafter. *Case:* Exclude from school for 7 days after onset of symptoms. Avoid exposure to women in early pregnancy. Check immunization records. *Contacts:* Those who are pregnant and not immunized should be urged to seek medical advice.
Hepatitis A (Infectious Hepatitis)	From 15 to 50 days, usually 28-30 days.	Fever, loss of appetite, nausea, abdominal discomfort and weakness followed by jaundice. Many unrecognized mild cases without jaundice occur, especially in children.	Communicability greatest from 7 days before to several days after onset of jaundice. *Case:* Exclude from school until physician advises return. Convalescence may be prolonged. *Contacts:* School exclusion not indicated.
Impetigo Contagiosa	Unknown.	Multiple skin lesions usually of exopsed areas (e.g., elbows, legs and knees), but may involve any area. Lesions vary in size and shape, and begin as blisters which rapidly mature into brown crusts on a reddened base. Healing from center outwards produces circular areas which may resemble ringworm.	*Case:* Exclude from school until physician advises return (usually 3-5 days). *Contacts:* Exclusion from school not indicated. Observe carefully for symptoms.

Disease	Incubation Period	Common Signs and Symptoms	Recommendations For Exclusion From School
Meningitis, Haemophilus	Usually 2-4 days.	Sudden onset of fever, vomiting, lethargy and stiff neck. Progressive stupor or coma are common.	*Case:* Exclude from school until physician advises return. *Contacts:* School exclusion not indicated. Observe carefully for symptoms, especially fever. Parents of day care center/nursery school contacts should be advised to check with their childrens physicians concerning prophylactic treatment with rifampin.
Meningitis, Meningococcal	From 2 to 10 days, usually 3 to 4 days.	Sudden onset of fever and intense headache. Delirium and coma often appear early; a characteristic (measles like) rash usually follows. Often fatal despite prompt disgnosis and treatment.	*Case:* Exclude from school during acute illness. (Non-communicable after 24 hours of appropriate drug therapy.) *Contacts:* School exclusion not indicated. Intimate (household) contacts should be urged to seek their physician's advice concerning prophylactic treatment with rifampin.
Infectious Mononucleosis (Glandular Fever)	Usually 4 to 6 weeks.	Fever, sore throat and enlarged lymph glands of the back of the neck. Generally mild illness and difficult to recognize in children.	*Case:* Exclude from school until physician advises return. *Contacts:* School exclusion not indicated.

Mumps (Infectious Paronns)	From 2 to 3 weeks, usually 18 days.	Fever with swelling and tenderness of the parotid glands located below and in front of one or both ears. Unrecognized mild cases without swelling may occur.	Communicable from 6 days before swelling until 9 days after. *Case:* Exclude from school until swelling disappears (usually 9 days). *Contacts:* School exclusion not indicated.
Pediculosis (Lice)	Under optimum conditions, eggs hatch in 7 days and reach maturity in about 14 days.	Severe itching and scratching, often with secondary infection. Scalp, and hairy portions of body may be affected. Eggs of head lice (nits) attach to hairs as small, round, gray lumps.	*Case:* Exclude from school until treated by a physician. *Contacts:* Direct inspection of head, body, and clothing recommended. School exclusion not indicated in absence of infestation.
Measles (Rubeola, Red Measles)	From 8-13 days, usually 10 days.	Prodrome characterized by fever followed by reddened eyes, runny nose, and cough. Dusky-red blotchy rash appears on day 3 or 4 and lasts 4 to 7 days.	Communicable from beginning of prodromal period to 4 days after appearance of the rash. *Case:* Exclude from school until at least 4 days after appearance of the rash. *Contacts:* Check immunication records. Exclude from school immediately on signs of prodrome.
Salmonellosis	From 6 to 72 hours, usually 12 to 36 hours.	Sudden onset of fever, abdominal pain, diarrhea, nausea, and frequent vomiting. Dangerous dehydration may occur in younger children.	Stools usually positive for Salmonella for several days to several weeks; occasional patients positive for several months. *Case:* Exclude from school during acute illness (usually 5 to 7 days). *Contacts:* School exclusion and stool cultures not indicated in absence of symptoms.

Disease	Incubation Period	Common Signs and Symptoms	Recommendation For Exclusion From School
Scabies	From 2 to 6 weeks.	Begins as itchy raised areas or burrows around finger webs, wrists, elbows, armpits, belt-line, and/or genitals. Extensive scratching often results in secondary infection.	*Case:* Exclude from school until physician advises return. *Contacts:* Direct inspection of body. School exclusion not indicated in absence of infestation.
Scarlet Fever	Usually 1 to 3 days, rarely longer.	Fever, sore throat, exudative tonsillitis or pharyngitis. Rash appears most often on neck, chest, and skin folds of arms, elbows, groin and inner aspect of thighs.	*Case:* Exclude from school during acute illness (usually 7 to 10 days). Non-communicable after 24 hours of appropriate drug therapy. *Contacts:* Exclude from school on appearance of signs of symptoms. Culturing of school contacts and treatment of carriers not usually indicated.
Shigellosis (Bacillary Dysentery)	From 1 to 7 days, usually 3 days.	Diarrhea, fever and often vomiting and cramps, in severe cases the stools may contain blood.	Infected cases contagious as long as stools are positive. *Case:* Exclude from school during acute illness and until cultures of feces are negative. (Other children in the family should be cultured. Children who have positive cultures should be excluded until their cultures are negative). *Contacts:* School exclusion not indicated. Stool cultures indicated only in suspected school outbreaks.

Whooping Cough (Pertussis)	Usually 7 days, almost uniformly within 10 days, and not exceeding 21 days.	Catarrhal stage begins with upper respiratory symptoms and increasingly irritating cough. The paroxysmal stage usually follows within 1 to 2 weeks, and lasts 1 to 2 months. Paroxysmal stage is characterized by repeated episodes of violent cough broken by a high-pitched inspiratory whoop. Older school children may not have whoop. Convalescence may require many weeks.	*Case:* Exclude from school while contagious (usually 2 to 3 weeks, less with antibiotic therapy) and until a physician advises return. *Contacts:* Search for missed or atypical cases. Exclude on first sign or symptom.

Director of Epidemiology
Virginia Department of Health

109 Governor Street
Richmond, Virginia 23219
Rev: August 1984

NOTE: *A more complete discussion of these conditions and other communicable diseases may be found in the book* Control of Communicable Diseases in Man (1980) *published by the American Public Health Association. Additional information and consultation are also available through your local health department.*

APPENDIX II

UNITED STATES DEPARTMENT OF AGRICULTURE GUIDE FOR CHILD NUTRITION PROGRAMS

BREAKFAST

The minimum amount of food components to be served as breakfast are as follows:

FOOD COMPONENTS	AGE 1 to 3	AGE 3 to 6	AGE 6 to 12 [1]
MILK			
Milk, fluid	½ cup [2]	¾ cup	1 cup
VEGETABLES & FRUITS			
Vegetable(s) and/or fruit(s)	¼ cup	½ cup	½ cup
OR			
Full-strength vegetable or fruit juice or an equivalent quantity of any combination of vegetable(s), fruit(s) and juice	¼ cup	½ cup	½ cup
BREAD AND BREAD ALTERNATES [3]			
Bread	½ slice	½ slice	1 slice
OR			
Cornbread, biscuits, rolls, muffins, etc.[4]	½ serving	½ serving	1 serving
OR			
Cold dry cereal [5]	¼ cup or ⅓ oz.	⅓ cup or ½ oz.	¾ cup or 1 oz.
OR			
Cooked cereal	¼ cup	¼ cup	½ cup
OR			
Cooked pasta or noodle products	¼ cup	¼ cup	½ cup
OR			
Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternative	¼ cup	¼ cup	½ cup

[1] Children age 12 and up may be served adult-size portions based on the greater food needs of older boys and girls, but shall be served not less than the minimum quantities specified in this section for children age 6 up to 12.

[2] For purposes of the requirements outlined in this subsection, a cup means a standard measuring cup.

[3] Bread, pasta or noodle products, and cereal grains shall be wholegrain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with wholegrain or enriched meal or flour; cereal shall be wholegrain or enriched or fortified.

[4] Serving sizes and equivalents to be published in guidance material by FNS.

[5] Either volume (cup) or weight (oz.), whichever is less.

LUNCH OR SUPPER

The minimum amounts of food components to be served as lunch or supper are as follows:

FOOD COMPONENTS	AGE 1 to 3	AGE 3 to 6	AGE 6 to 12 [1]
MILK			
Milk, fluid	½ cup [2]	¾ cup	1 cup
VEGETABLES & FRUITS			
Vegetable(s) and/or fruit(s)	¼ cup total	½ cup total	¾ cup total
BREAD AND BREAD ALTERNATES [3]			
Bread	½ slice	½ slice	1 slice
OR			
Cornbread, biscuits, rolls, muffins, etc.[4]	½ serving	½ serving	1 serving
OR			
Cooked pasta or noodle products	¼ cup	¼ cup	½ cup
OR			
Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternative	¼ cup	¼ cup	½ cup
MEAT AND MEAT ALTERNATIVES			
Lean meat or poultry or fish [5]	1 oz.	1½ oz.	2 oz.
OR			
Cheese	1 oz.	1½ oz.	2 oz.
OR			
Eggs	1 egg	1 egg	1 egg
OR			
Cooked dry beans or peas	¼ cup	⅜ cup	½ cup
OR			
Peanut butter or an equivalent quantity of any combination of meat/meat alternate	2 tbsp.	3 tbsp.	4 tbsp.

[1] Children age 12 and up may be served adult-size portions based on the greater food needs of older boys and girls, but shall be served not less than the minimum quantities specified in this section for children age 6 up to 12.

[2] For purposes of the requirements outlined in this subsection, a cup means a standard measuring cup.

[3] Bread, pasta or noodle products, and cereal grains shall be wholegrain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with wholegrain or enriched meal or flour; cereal shall be wholegrain or enriched or fortified.

[4] Serving sizes and equivalents to be published in guidance material by FNS.

[5] Edible portion as served.

MEAL PATTERNS FOR CHILDREN IN CHILD CARE PROGRAMS

The Child Care Food Program gives Federal aid to child care centers and family and group day care homes. The goal of the program is to improve the diets of children providing them with nutritious, well-balanced meals. This publication is intended to assist large centers with the purchase and preparation of the correct quantities of food. It contains meal patterns, food components, can and jar sizes, and food yields. The following meal patterns contain the minimum food components which must be served in order to be reimbursed by USDA.

FOOD COMPONENTS	Children 1 up to 3 years	Children 3 up to 6 years	Children 6 up to 12 years
MILK			
Milk, fluid [1]	½ cup	¾ cup	1 cup
Juice or fruit or vegetable	¼ cup	½ cup	½ cup
Bread and/or cereal, enriched or whole grain: [2]			
Bread	½ slice	½ slice	1 slice
Cereal:			
Cold dry	¼ cup [3]	⅓ cup [4]	¾ cup [5]
Hot cooked	¼ cup	¼ cup	½ cup
MID-MORNING OR MID-AFTERNOON SUPPLEMENT (Snack)			
(Select 2 of these 4 components)			
Milk, fluid [1]	½ cup	½ cup	1 cup
Meat or meat alternate	½ ounce	½ ounce	1 ounce
Juice or fruit or vegetable	½ cup	½ cup	¾ cup
Bread and/or cereal, enriched or whole grain: [2]			
Bread	½ slice	½ slice	1 slice
Cereal:			
Cold dry	¼ cup [3]	⅓ cup [4]	¾ cup [5]
Hot cooked	¼ cup	¼ cup	½ cup

FOOD COMPONENTS	Children 1 up to 3 years	Children 3 up to 6 years	Children 6 up to 12 years
LUNCH OR SUPPER			
Milk, fluid [1]	½ cup	¾ cup	1 cup
Meat or meat alternate: [6]			
Meat, poultry, or fish, cooked [7]	1 ounce	1½ ounces	2 ounces
Cheese	1 ounce	1½ ounces	2 ounces
Egg	1	1	1
Cooked dry beans or peas	¼ cup	⅜ cup	½ cup
Peanut butter	2 tablespoons	3 tablespoons	4 tablespoons
Vegetable and/or fruit [8]	¼ cup	½ cup	¾ cup
Bread, enriched or whole grain [2]	½ slice	½ slice	1 slice

[1] Includes whole milk, lowfat milk, skim milk, cultured buttermilk, or flavored milk made from these types of fluid milk which meet State and local standards.

[2] Or an equivalent serving of an acceptable bread product made of enriched or whole grain meal or flour, or enriched or whole grain rice or pasta. See listing in FNS-64. A Planning Guide for Food Service in Child Care Centers, for serving sizes of acceptable bread/bread alternates.

[3] ¼ cup (volume) or ⅓ ounce (weight), whichever is less.

[4] ⅓ cup (volume) or ½ ounce (weight), whichever is less.

[5] ¾ cup (volume) or 1 ounce (weight), whichever is less.

[6] Or an equivalent quantity of any combination of foods listed under Meat or Meat Alternatives.

[7] Cooked lean meat without bone.

[8] Must include at least two kinds.

SUPPLEMENTAL FOOD

The minimum amounts of food components to be served as supplemental food are as follows. Select two of the following four components. (Juice may not be served when milk is served as the only other component.)

FOOD COMPONENTS	AGE 1 to 3	AGE 3 to 6	AGE 6 to 12 [1]
MILK			
Milk, fluid	½ cup [2]	½ cup	1 cup
VEGETABLES & FRUITS			
Vegetable(s) and/or fruit(s)	½ cup	½ cup	¾ cup
OR			
Full-strength vegetable or fruit juice or an equivalent quantity of any combination of vegetable(s), fruit(s) and juice	½ cup	½ cup	¾ cup
BREAD AND BREAD ALTERNATES [3]			
Bread	½ slice	½ slice	1 slice
OR			
Cornbread, biscuits, rolls, muffins, etc.[4]	½ serving	½ serving	1 serving
OR			
Cold dry cereal [5]	¼ cup or ⅓ oz.	⅓ cup or ½ oz.	¾ cup or 1 oz.
OR			
Cooked cereal	¼ cup	¼ cup	½ cup
OR			
Cooked pasta or noodle products	¼ cup	¼ cup	½ cup
OR			
Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternative	¼ cup	¼ cup	½ cup

FOOD COMPONENTS	AGE 1 to 3	AGE 3 to 6	AGE 6 to 12 [1]
MEAT AND MEAT ALTERNATIVES			
Lean meat or poultry or fish [6]	½ oz.	½ oz.	1 oz.
OR			
Cheese	½ oz.	½ oz.	1 oz.
OR			
Eggs	½ egg	½ egg	1 egg
OR			
Cooked dry beans or peas	⅛ cup	⅛ cup	¼ cup
OR			
Peanut butter or an equivalent quantity of any combination of meat/meat alternate	1 tbsp.	1 tbsp.	2 tbsp.

[1] Children age 12 and up may be served adult-size portions based on the greater food needs of older boys and girls, but shall be served not less than the minimum quantities specified in this section for children age 6 up to 12.

[2] For purposes of the requirements outlined in this subsection, a cup means a standard measuring cup.

[3] Bread, pasta or noodle products, and cereal grains shall be wholegrain or enriched, cornbread, biscuits, rolls, muffins, etc., shall be made with wholegrain or enriched meal or flour, cereal shall be wholegrain or enriched or fortified.

[4] Serving sizes and equivalents to be published in guidance material by FNS.

[5] Either volume (cup) or weight (oz.), whichever is less.

[6] Edible portion as served.

APPENDIX III

VITAMIN A FOOD SOURCES
SOME FOODS WITH VITAMIN A, VITAMIN C, AND IRON

Vitamin A	*Excellent Sources	
Vegetables	Fruits	Meats
Asparagus	*Apricots	Liver
*Broccoli	*Cantaloupe	
*Carrots	Cherries, red sour	
Chili peppers (red)	Papaya	
Kale	Peaches, (not canned)	
*Mixed vegetables	Plums, purple (canned)	
*Peas and carrots	Prunes	
Pumpkin	Pumpkin	
Spinach	Watermelon	
*Squash-winter		
*Sweet potatoes		
Tomatoes		
Tomato juice, paste or puree		
*Turnip greens		
Vegetable juices		

APPENDIX C

STIPULATIONS

The plaintiffs Forest Hills Early Learning Center, Inc., Academy Day Care, Inc., and Holloman Child Care Centers, Inc., by counsel, defendant William L. Lukhard, by counsel, and defendant-intervenors Grace Baptist Church, Berean Baptist Church, Tabernacle Baptist Church, and The Rock Church, by counsel, and defendant-intervenors Shenandoah Baptist Church and Pastor Robert L. Alderman, by counsel, submit the following stipulations to be admitted into the evidentiary record in this case.

1. Each of the plaintiffs owns and operates one or more child-care centers in Virginia under license issued by the defendant Lukhard pursuant to *Va.Code* Section 63.1-196. None of the plaintiffs' centers is operated or conducted under the auspices of a religious institution.

2. Plaintiff Forest Hills Early Learning Center, Inc. is a proprietary corporation that operates a center located in Lynchburg, Virginia.

3. Plaintiff Academy Day Care, Inc. is a non-profit corporation that operates a center in Woodbridge, Virginia.

4. Plaintiff Holloman Child Care Centers, Inc. is a proprietary corporation that operates centers in Hampton and Grafton, Virginia.

5. Defendant-Intervenor Tabernacle Baptist Church ("Tabernacle") operates a child care center in Virginia Beach as part of its ministry. In 1972, Tabernacle considered opening a child care center and contacted state officials to inquire about licensing, which at that time was required of all child care centers under state law. Tabernacle subsequently decided not to pursue a license at that time.

6. Tabernacle contacted the licensing division of the Department of Welfare again in 1976 and was issued a provisional license for a child care center for up to 40 children, ages 2 to 5. After Tabernacle met all the requirements for licensure, a full license was issued it on April 20, 1977. Tabernacle sent a renewal application to the Department of Welfare in May of 1978.

7. On June 2, 1978, Tabernacle returned its license to the Department and advised the Department that it would not accept a renewal license. In its letter to the Department, Tabernacle stated, "[O]ur convictions and beliefs do not allow us to permit anyone but God himself to control, regulate, or dictate to our church. The intrinsic quality or content of licensure is that a higher power may only license a lower power. If we permitted the Commonwealth of Virginia to license the Tabernacle Baptist Church day care center, we believe that we would be giving the state false recognition as a higher power than God himself and this we refuse to do."

8. Between August of 1976 and June of 1978, Tabernacle provided the Department all of the information required in order to establish its compliance with the minimum licensing standards.

9. Tabernacle has operated a nursery and day care center without a license from the state since June 1978. After the General Assembly in 1979 passed House Bill 276 exempting from licensure child care centers operated under the auspices of a religious institution, the Department determined on or about July 29, 1980, that Tabernacle's day care center met the requirements of the exemption statute, *Va.Code* Section 63.1-196.3. Since the passage of House Bill 276, Tabernacle has filed annually the documents required by the exemption statute.

10. Defendant-Intervenor Berean Baptist Church of Salem, Virginia operates a preschool and kindergarten program as part of its church ministry. In December,

1972, Reverend Rudy Holland, Pastor of Berean, contacted the licensing division of the Department to inquire about the requirements for licensure and was sent the minimum standards for licensed child care centers. Because Berean encountered zoning problems with its facility, it was unable to open its center in the fall of 1973.

11. After its zoning problems were resolved, Berean applied for a license from the state in the summer of 1974, as required at that time by state law. Berean was issued a provisional license for its day care center and kindergarten for forty-five children ages 2 to 12 in September of 1974 and was issued a regular license on October 9, 1974, for a twelve-month period.

12. Berean's license was renewed in December of 1975 and again in January 1977 for a period of six months.

13. In June of 1977, counsel for Berean advised the Department of Welfare that Berean objected to the licensing of its nursery and day care center, stating that "the Berean Christian Academy and Day Care Center is operated as an integral part of the Berean Baptist Church of Salem, Virginia. All the ministeries of the Berean Baptist Church are conducted and exist by declaration of the convictional faith of this church. As I am sure you can appreciate, the licensing of the Bureau Christian Academy for day care purposes would require the licensing of an integral ministry of the Bereau Baptist Church." *See* Defendant-Intervenors' Exhibit 14 Grace Baptist Church, et al.

14. Between July, 1974 and June, 1977, Berean provided the Department of Welfare all of the information required to establish its compliance with the minimum licensing standards.

15. From June, 1977 to the present, Berean has operated its preschool program without a license. On August

17, 1979, the Department of Welfare advised Berean that it had met the statutory requirements of the newly-passed statute exempting Berean and other church-run child care programs from state licensure.

16. Grace Baptist Church of Petersburg, Virginia has operated a child care center exempted from licensure by *Va.Code* Section 63.1-196.3 since on or about April of 1984. In that time, Grace Baptist Church has complied with the requirements of the exemption statute.

17. The Rock Church in Virginia Beach, Virginia has operated a child care center exempted from licensure by *Va.Code* Section 63.1-196.3 since August of 1980. In that time, The Rock Church has complied with the requirements of the exemption statute.

18. Defendant-Intervenor Shenandoah Baptist Church ("Shenandoah") operates a preschool in Roanoke County, Virginia as a part of the ministry of the church.

19. In 1973, Shenandoah applied for a license to operate a preschool. Shenandoah was granted a provisional license for the period November 15, 1973 through April 14, 1974, after which a regular license was issued. Shenandoah's preschool remained licensed through February, 1978. During that time period, Shenandoah provided to the Department all of the information required to establish its compliance with the Minimum Licensing Standards.

20. On February 4, 1978, Shenandoah returned its license to the Department of Welfare stating as follows: "Having examined carefully the significance of the licensing procedure of the Department of Welfare in relationship to our children's ministries, we are convinced that we have violated one of our basic Biblical and Constitutional principles in applying for and accepting your license for the purpose of operating a church ministry."

21. Since February, 1978, Shenandoah has conducted its preschool without a license. Since the passage of House Bill 276, Shenandoah has filed documents required by the exemption statute.

22. As of October 31, 1986, there were 837 licensed child care centers in Virginia, 151 exempt centers, and 68 centers that have notified the state of their intention to operate an exempt center. Among the 837 licensed centers, approximately 106 are church-run centers.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 82-1679

FOREST HILLS EARLY LEARNING CENTER, INC.;
ACADEMY DAY CARE CENTER, INC. and
HOLLOMAN CHILD CARE CENTERS, INC.,
Appellants,

v.

WILLIAM LUKHARD, DIRECTOR OF
DEPARTMENT OF WELFARE AND
INSTITUTIONS OF COMMONWEALTH OF VIRGINIA,
Appellee.

VIRGINIA COUNCIL OF CHURCHES,
Amicus Curiae.

CHRISTIAN LAW ASSOCIATION,
Amicus Curiae.

Argued Feb. 7, 1983

Decided Feb. 7, 1984

Before WIDENER, PHILLIPS and MURNAGHAN, Circuit Judges.

JAMES DICKSON PHILLIPS, Circuit Judge:

Forest Hills Early Learning Center and several other nonsectarian operators of child care centers [1] appeal a

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[1] In an earlier stage the action was dismissed for plaintiffs' lack of standing, 487 F.Supp. 1378 (E.D.Va. 1979). This court held the

judgment of the district court upholding the constitutionality of Virginia's statutory exemption of religiously affiliated child care centers from the general licensing requirements imposed upon the operation of such centers by the Commonwealth. 540 F.Supp. 1046. The nonsectarian centers brought this action against the responsible state official, challenging the constitutionality of the exemption on the basis that it violated the establishment clause of the first amendment and also denied the nonsectarian centers the equal protection of law.[2] On the parties' cross-motions for summary judgment, the district court granted summary judgment in favor of the state defendant, holding that the exemption had both a secular purpose and primary secular effect and involved a permissible effort by the state to comply with its constitutional obligation to avoid infringement of the sectarian sponsors' rights under the religion clauses.

We conclude that, under the establishment clause, the challenged exemption is facially overbroad as a permissible accommodation to any free exercise rights of the sectarian operators of child care centers. On this basis, we hold that summary judgment was improperly granted to the defendant. On the same basis, we hold that summary judgment might properly be granted to the nonsectarian plaintiffs on the present record. But we conclude that because of critical inadequacies in that record

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dismissal on that basis erroneous and remanded for further consideration of the standing issue on an expanded record. *Forest Hills Early Learning Center, Inc. v. Lukhard*, No. 80-1272 (4th Cir. Jan. 9, 1981) (unpublished). No question of standing is now raised.

[2] The action is nominally against the named Director of the Department of Welfare of the Commonwealth of Virginia in his official capacity. The complaint seeks a declaration that the exemption is unconstitutional, and injunctive relief compelling general application of the preexemption child care licensing provisions to all child care centers irrespective of religious affiliation.

For convenience, we refer hereafter to the defendant as "the state."

and the absence as parties of the sectarian center operators, such a disposition would be inconclusive of the underlying, conflicting constitutional claims of the sectarian and nonsectarian operators in respect of the state's regulatory scheme. For this reason, we vacate and remand to allow the sectarian operators, if so disposed, to intervene to press in further proceedings their free exercise claims against the establishment clause claims of plaintiffs. Failing intervention by the sectarian operators under the conditions we express, we direct entry of summary judgment in favor of plaintiffs.

I

The Commonwealth of Virginia has regulated all child care centers since at least 1948 by requiring these centers to meet certain licensing standards. From 1968 to 1979, all persons who operated child care centers, without regard to sectarian or nonsectarian affiliation, were required to comply with the licensing requirements of Va. Code §§ 63.1-195 through 63.1-219 and the regulations promulgated thereunder. An applicant for a license under these provisions was required to submit an application to the Commissioner of the Department of Welfare containing an outline of the center's proposed activities, facilities and services, § 63.1-197; the Commissioner was then required to investigate the applicant's proposal and to inquire into the character, reputation and financial responsibility of the applicant, § 63.1-198. The applicant was required to grant the Commissioner reasonable opportunity to inspect its facilities, books and records and to interview its employees and agents. *Id.*

If the Commissioner found that the applicant's operation was reasonably conducive to the welfare of the children it might serve and that the applicant's financial responsibility gave reasonable assurance of continued maintenance of its operation, the Commissioner was to issue a license, § 63.1-199. The Commissioner retained the right

to inspect the center and to interview any employee or customer of the center at reasonable times, § 63.1-210. In addition to complying with these statutory requirements, a person seeking a license for operating a center had to comply with regulations drawn up by the State Board of Welfare that prescribe general standards and policies for the operation of child care centers. *See* § 63.1-202.

During the early 1970's the number of child care centers in Virginia increased significantly to meet the rising demand for outside-the-home child day care. As the number of centers increased, the Virginia Department of Welfare received numerous complaints that many of the centers were providing inadequate facilities, meals and supervision. Based upon an investigation, the Department determined that many centers were sacrificing the best interests of the children in order to maintain financial stability and to offer competitive prices. The Department further determined that many parents never visited a center before they enrolled their children there and that decisions concerning the choice of a center were often made without any parental knowledge or information about the centers.

The Department thereupon concluded that the regulations concerning licensing and operation should be upgraded to insure that the pressures of a competitive marketplace did not intrude upon the well-being of children utilizing the service of a center. In 1976, the State Board promulgated new and more stringent regulations, which are summarized in the margin.[3] These regulations

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[3] The Department of Welfare standards are set forth in their entirety at J.A. 15-82. For convenience, they can be summarized as follows:

Section I of the licensing regulations is the definition section.

Section II, entitled "Licensing Procedures," prescribes the materials that must be filed with an application for a license to operate a child care center. These materials include a state-

imposed substantial requirements on all child care centers in many areas, including space, health, safety, and nutritional standards, child/staff ratios, administrative

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ment regarding the sponsorship and organization of the child care center, the person responsible for policy-making, administration and operation, an estimated budget, and similar information.

Section III, entitled "Administration," requires child care centers to have a board of directors that is responsible for its operations. (§ III(A)) Child care centers are required to have sufficient financial resources to provide "desirable quality of service and to meet the needs of children in care" (§ III(B)), and have specified minimum public liability insurance for bodily injury. (§ III(B)(4)).

Section IV, entitled "Physical Plant," establishes the physical requirements of the center itself. Among other requirements, the child care center must have kitchen space, eating space, sleeping space, toilet and handwashing facilities, and separate storage space for records and equipment. (§ IV(A)(2)) The building must have twenty-five square feet of indoor play space and seventy-five square feet of outdoor play space per child. (§ IV(C)(1) and (2)) There must be a separate room for isolation of children in case of sickness. (§ IV(A)(4)) Each child must have individual storage space for his clothing and personal items. (§ IV(A)(3)) Child care centers serving infants and toddlers must provide separate areas for those children who can walk or are learning to walk and those children who have not reached that stage of development. (§ IV(A)(3) ("Infant and Toddler Care")) Provision must be made for study space for those school age children who want to study. (§ IV(A)(2) ("School Age Care")) The heat of the building must be maintained between 68° and 72° Farenheit. (§ IV(B)(2)) A separate crib, cot or bed must be provided to each child who is regularly in attendance at naptime or bedtime. (§ IV(D)(2))

Section V, entitled "Personnel," forbids employment at a child care center of a person convicted of child abuse, child neglect, or moral turpitude. The regulation also provides minimum educational requirements for child care supervisors that can be satisfied by either secular or religious formal education, and also permit the substitution of practical work experience for educational requirements. (§ V(B)(4)) Part D of Section

structure, staff applications, parental participation, record-keeping, program requirements, financial disclosure, disciplinary practices and others.

These standards were adopted in 1976 and applied to all child care centers, as had been the practice with prior regulations in the area. After the regulations were implemented a number of churches that operated child care

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V establishes the ratio of supervisory staff to children at various age levels.

Section VI, entitled "Cooperative Planning with Parents," requires consultation between the child care centers and parents of enrolled children before admission and during enrollment.

Section VII, entitled "Records," requires records to be maintained for each child of an emergency telephone number, his attendance at the center, and the like.

Section VIII, entitled "Program," establishes minimum nutritional requirements for meals and snacks served at child care centers, as well as program requirements for the various age-levels of children enrolled in the child care centers.

Section IX, entitled "Health Standards," establishes various health standards for licensed child care centers. Each employee and volunteer must pass an annual physical examination. (§ IX (A)(1)) Each child must be examined annually by a physician, and must have had immunizations in accordance with the state's Preschool Entrance Health Examination Brochure. (§ IX(B)(1)) A health inspection of each child must be made daily before admittance. (§ IX(B)(2)) Designated staff must receive consultation at least annually from a doctor, nurse, or health department medical personnel to obtain instruction in screening children. (§ IX(B)(2)(b)) A child may be given nonprescription drugs only with his or her parent's or guardian's written consent and prescription drugs only with such written consent and a doctor's order or prescription label. (§ IX(B)(4)) The child care center must keep cleaning fluids and other harmful household agents locked and out of reach of children. (§ IX(B)(6)) Each child care center must keep a first aid kit, and have at least one staff member with formal first aid training. (§ IX(B)(7))

Section X, entitled "Local Ordinances" requires compliance with local child care ordinances.

centers opined to the Commissioner of the Virginia Department of Welfare, William L. Lukhard, that the new licensing requirements infringed their right freely to exercise their religious beliefs. In response to these complaints the Virginia legislature enacted Va.Code § 63.1-196.3, which exempts all "[c]hild care center[s] operated or conducted under the auspices of . . . religious institution[s]" from compliance with the licensing requirements of § 63.1-196. Those requirements remain fully applicable to all nonsectarian child care centers, and, by express statutory provision, to any sectarian centers whose sponsors nevertheless elect to be covered. § 63.1-196.3D.

Section 63.1-196.3, set out in the margin,[4] does require the sectarian centers to meet several requirements

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[4] Section 63.1-196.3 of the Virginia Code states in full:

Child-care center operated by religious institution exempt from licensure; annual statement and documentary evidence required; enforcement; injunctive relief.—A. Notwithstanding any other provisions of this chapter, a child-care center operated or conducted under the auspices of a religious institution shall be exempt from licensure as required by § 63.1-196. Such religious institution shall file with the Commissioner of Welfare, prior to beginning any such operation and thereafter annually, a statement of intent to operate a child-care center, certification that the child-care center has disclosed to the parents or guardians of the children in the center the qualifications of the personnel employed therein and documentary evidence that:

1. Such religious institution has tax exempt status as a nonprofit religious institution in accordance with § 501(c) of the Internal Revenue Code of 1954, as amended, or that the real property owned and exclusively occupied by the religious institution is exempt from local taxation.

2. Within the prior ninety days, the local health department and local fire marshal or Office of the State Fire Marshal whichever is appropriate, have inspected the physical facilities of the child-care center and have determined that the facility is in compliance with applicable laws and regulations with regard to food service activities, health and sanitation, water supply, building codes, the Virginia Fire Safety Regula-

but, as appears from its text, these requirements are minimal and consist mainly of compliance with generally

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tions or the Uniform Statewide Building Code and local fire requirements.

3. The child-care center employs supervisory personnel according to the following ratio of adults to children:

a. One adult to four children from zero to twenty-four months.

b. One adult to ten children from ages twenty-four months to six years.

c. One adult to twenty-five children ages six years and older.

Each person in a supervisory position shall be certified by a practicing physician to be free from any disability which would prevent him from caring for such children as will be under his supervision.

4. The following aspects of the child-care center's operations are described in a written statement provided to the parents or guardians of the children in the center and made available to the general public: physical facilities, enrollment capacity, food services, health requirements for the staff and public liability insurance.

B. If a religious institution operates a child-care center and does not file the statement and documentary evidence required by paragraph A hereof, the Commissioner shall give reasonable notice to such religious institution of the nature of its noncompliance and may thereafter take such action as he determines appropriate, including a suit to enjoin the operation of the child-care center.

C. Any parent or guardian of a child in a child-care center who has reason to believe that a child-care center falling within the provisions of this section is not in compliance with the requirements of paragraph A of this section may report the same to the local department of welfare, the local health department or the local fire marshal, each of which may inspect the child-care center for noncompliance, give reasonable notice to the religious institution, and thereafter may take appropriate action as provided by law, including a suit to enjoin the operation of the child-care center.

D. Nothing in this section shall prohibit a child-care center operated by or conducted under the auspices of a religious institution from obtaining a license pursuant to chapter 10 (§ 63.1-195 et seq.) of Title 63.1 of the Code. (1979, c. 425.)

applicable health and safety standards related to human occupancy and use of physical facilities. In lieu of applying for and securing a license, the sectarian institutions have merely to file with the Commissioner of Welfare an initial and thereafter annual statement of intent to operate a child care center; certify that they have disclosed to all parents or guardians of enrolled children the qualifications of the staff personnel; present documentation of their tax-exempt status and of their compliance with local health and fire ordinances and with certain staff ratio requirements; and make public disclosure of certain aspects of their operations. If an exempt center fails to file the required statement of intent, the Commissioner of Welfare may take "such action as he determines appropriate," including a suit to enjoin its operation. § 63.1-196.3B. If a parent or guardian lodges a complaint with any local welfare, health, or fire department related to an exempt center's failure to comply with generally applicable health and safety regulations, those local agencies may inspect the center's facilities and take "appropriate action as provided by law, including a suit to enjoin the operation of the child-care center." § 63.1-196.3C. These are the only official inspection and enforcement mechanisms provided for the exempt centers. In contrast to the nonsectarian centers, no state level inspection or enforcement mechanisms beyond that related to the filing statement requirement are provided for operation of the exempt centers.

The net effect of the exemption in its new differentiation between sectarian and nonsectarian child care centers can therefore be summarized as follows.

In the critical areas of licensing itself, and of program, insurance, financial, resources and management, staff qualification, and internal administration following licensure, the sectarian centers are wholly relieved of official state regulation, while the nonsectarian centers remain subject

in all these areas to extensive regulation under standards enforceable by state agency inspection and legal sanctions. In place of the extensive state inspection and enforcement mechanisms which remain available to enforce compliance by the nonsectarian centers with these standards, there has been substituted for the sectarian centers only limited disclosure and certification requirements respecting the qualifications (unspecified) of its staff personnel, its tax-exempt status, its liability insurance coverage, its current compliance with applicable health and safety laws, and a written description of its physical facilities, enrollment capacity, food service and staff health requirements. Although the disclosure and certification requirement is itself enforceable, no sanctions with respect to the matters required to be disclosed or certified remain for the sectarian centers, as they do with respect to the nonsectarian.

In the general areas of child health and safety, the sectarian centers are relieved of a wide range of special regulatory standards related to nutrition, space, heat, light, ventilation, and physical safety which still apply to the nonsectarian centers and are enforceable against those centers by state level inspection and sanctions. In place of these special standards related to child health and safety there has been substituted for the sectarian centers only those health and safety standards already applicable to the general population through local and state fire, safety, and sanitation codes. In place of the state level inspection and enforcement mechanisms available to enforce compliance by the nonsectarian centers with applicable general and special health and safety standards, there has been substituted for the sectarian centers only the inspection and enforcement powers (presumably already available under general law) of local health, welfare and fire departments, acting on complaints of parents or guardians of affected children.

Reacting to this substantial new differentiation in licensing requirements, standards and enforcement mech-

anisms, the nonsectarian center plaintiffs brought this action, challenging on constitutional grounds the state's statutory exemption of sectarian sponsored centers. Plaintiffs contended that the exemption violated the establishment clauses of the federal and state constitutions, and the equal protection clause of the federal constitution. On the parties' cross-motions for summary judgment, the district court upheld the exemption against the establishment clause and equal protection challenges, essentially on the same general ground: that the state's obligation to avoid infringing the free exercise rights of the sectarian centers sponsors provided a sufficient "secular purpose" and "primary secular effect" to withstand the establishment clause challenge and a sufficiently "compelling state interest" to withstand the equal protection challenge.

Critical to the district court's decision was its express conclusion that it was irrelevant whether free exercise rights of the sectarian center operators were actually being burdened by the pre-exemption licensing requirements and if so, to what extent. In the court's view, "such is not the question before the Court." J.A. 187. In assessing whether the exemption reflected a justifying "secular legislative purpose," or a "compelling state interest," it sufficed for the court that by means of the exemption "the State hoped to prevent possible litigation of any free exercise claims against the licensing requirements and at the same time to assure the welfare of children in church centers by means which intrude as little as possible upon the activities of the church." J.A. 189. For the district court, "[l]ogic supports the conclusion that if regulations arguably violate the free exercise clause it is justifiable for the State to employ a less intrusive means of regulating the church-run centers." *Id.*

From the district court's resulting grant of summary judgment to defendant and denial of summary judgment to plaintiffs, plaintiffs took this appeal.

II

This case presents a unique litigation clash between the religion clauses of the first amendment.[5] Though direct clashes between the two are understandably avoided by the courts whenever possible, *see Widmar v. Vincent*, 454 U.S. 263, 273 & n. 13, 102 S.Ct. 269, 276 n. 13, 70 L.Ed.2d 440 (1981), they are, of course not unprecedented, *see Sherbert v. Verner*, 374 U.S. 398, 413-17, 83 S.Ct. 1790, 1798-01, 10 L.Ed.2d 965 (1963) (Stewart, J., concur-

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[5] While the plaintiffs' establishment clause and equal protection challenges are conceptually different, we think that in the final analysis resolution of the issues raised under the two comes to the same thing.

The "equal protection" allegedly denied lies in the disparate treatment accorded the sectarian and nonsectarian centers. Justification for the conceded inequality is sought by the state in a "compelling state interest" in avoiding infringement of free exercise rights of the sectarian operators.

The establishment clause claim is that the same difference of treatment impermissibly favors religion over nonreligion. Justification for the same action as challenged in those terms is sought in the identical avoidance of free exercise rights of the sectarian operators, asserted in this context as a "secular legislative purpose."

Whether analyzed as "secular purpose" or "compelling state interest," the justification therefore turns on the same ultimate inquiry: whether and to what extent the free exercise rights whose protection is asserted as justification for the manifestly disparate treatment did in fact exist.

While it may be as well, where possible, to avoid head-on clashes between the religion clauses, it is not possible here. If plaintiffs' claim is analyzed solely in equal protection terms, the head-on clash is only put over to a later stage in analysis. In assessing the extent to which the state's undeniably compelling interest in accommodating any actual free exercise rights justified the particular accommodation afforded by the challenged exemption, the ultimate constraint on the state's permissible range of accommodation will still be found in the establishment clause's barrier against unduly favoring religion over nonreligion.

In these circumstances, we have confined our analysis to the establishment clause challenge and the issues joined under it.

ring). The uniqueness here has to do with the procedural setting in which this clash—an unavoidable one—occurs. Because the resulting adjudicative difficulty heavily influences the decision we reach, we commence by analyzing the way in which free exercise and establishment clause rights are here brought into conflict.

The essence of the matter is simply stated. The "religious institutions" exemption is challenged on the basis that it violates the establishment clause: that in its sphere of operation the exemption impermissibly favors "religion over nonreligion." *See Walz v. Tax Commission*, 397 U.S. 664, 694, 90 S.Ct. 1409, 1424, 25 L.Ed.2d 697 (1969) (Harlan, J., concurring). As the parties and the district court properly saw, the appropriate standard for assessing this established clause challenge is the three-part guideline test of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Under that analytical test, the challenged legislation fails constitutionally unless it is found to have a secular legislative purpose, to have a primary effect that does not advance or inhibit religion, and to have no potential for fostering excessive governmental entanglement with religion. *Id.* at 612-13, 91 S.Ct. at 2111. Seeking to justify the statutory exemption under this test, the state has advanced as the "secular purpose" of the exemption the constitutionally compelled or permitted accommodation it makes to the free exercise rights of the exempted institutions.[6]

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[6] The state also asserts, though with less emphasis, that the exemption permissibly accommodates establishment clause rights of the sectarian centers. The basic thrust of this "counter-establishment clause" theory is, apparently, that the pre-exemption licensing requirements, particularly those having to do with inspection and compliance mechanisms, involved "excessive entanglement" of the state with the sectarian centers; that the exemption was therefore justified to avoid this consequence. A type of 'negative establishment" by virtue of excessive regulation without corresponding beneficial treatment of religious institutions has undoubtedly been recognized in the religion clause cases. *See Lemon v. Kurtzman*,

By this process, constitutional compliance with one of the religion clauses has been advanced in litigation as a justifying "secular purpose" for legislation challenged under the other. An awkwardness results that is both conceptual and practical. Because it bears directly upon the court's ability fairly to adjudicate the conflicting religion claims on the summary judgment record we review, we pause to point up the special nature of the difficulty.

In the setting of this case the persons whose free exercise rights are centrally in issue are not parties to the litigation and those rights have not been authoritatively established in any other constitutional adjudication. Rather, the rights of those persons are being indirectly asserted in this litigation by the state, which more commonly in free exercise litigation finds itself on the other side, defending or seeking to enforce legislation challenged by such persons as violative of free exercise rights.[7] The result of a successful defense by the state in this case would therefore be a confirmation by judicial review

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403 U.S. at 614-25, 91 S.Ct. at 2112-17; *Walz v. Tax Commission*, 397 U.S. at 674, 90 S.Ct. at 1414. But the contours of "negative establishment" by virtue of "excessive involvement through regulation" are by no means clear. In any event they involve questions of degree that we think are wholly subsumed within the more direct question whether and to what extent free exercise rights of the sectarian operators may have been burdened by the pre-exemption regulatory pattern here in issue. That is to say, we do not see how any "negative establishment clause" rights to be free of "excessively entangling regulation" could be greater than the more directly pertinent rights here asserted to be relieved of the same regulatory burden upon free exercise rights.

For this reason, we confine our analysis to the exemption's justification as a permissible accommodation to free exercise rights.

[7] *See*, as specifically illustrative, the following recent cases involving state laws regulating the operation of child care and related services: *Kansas v. Heart Ministries, Inc.*, 227 Kan. 244, 607 P.2d 1102, (enforcement action by state), *appeal dismissed*, 449 U.S. 802, 101 S.Ct. 47, 66 L.Ed.2d 6 (1980); *Tabernacle Baptist Church v. Conrad*, C/A No. 79-149 (D.S.C. Oct. 27, 28, 1980) (unpublished) (action by free exercise claimants to enjoin enforcement).

of a prior legislative accommodation of free exercise rights of persons whose entitlement thereto will never have been put to test in an adversarial adjudicative process in which they were parties with the normal burdens of production and persuasion on disputed factual and legal issues.

To point out this akwardness is not of course to suggest that persons claiming free exercise rights (or others of constitutional origin) may only have them officially recognized and vindicated by judicial challenges to prior legislative (or executive) action alleged to have violated them. The right to petition government for redress of grievances obviously is not so circumscribed. Neither is it to suggest, in corollary, that only the courts and not the legislative (or executive) branches of government may recognize and extend first instance protection to constitutional rights, including those secured by the religion clauses. Of course the other branches—both federal and state—may and do so. But the action of these other branches is of course then subject to judicial review if the governmental action is later put in constitutional issue in a judicial case or controversy, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), and therein lies the rub here.

Here, the state's legislative determination that it was constitutionally compelled or, at least, permitted to accommodate free exercise rights, has been put directly in issue by the state's litigation assertion that this provided the "secular legislative purpose" for the challenged exemption.[8] This presents a difficult problem concerning

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[8] Two different theories respecting the nature of the state's justification are advanced on this appeal.

Taking the most extreme position possible, Christian Law Associates, as *amicus curiae* aligned in interest with the state, apparently contends that total accommodation is compelled by the mere fact that religious institutions are the sponsors of the exempt centers.

The state takes a more cautious position—apparently that accepted by the district court—that because the exempted activities

the proper scope and standard of judicial review of the resulting legislative action. For although the issue directly posed is whether under the *Lemon v. Kurtzman* test constitutional compulsion or authority constituted a justifying "secular purpose" for the challenged exemption, the dispositive issue must be the underlying one, indirectly raised, whether and to what extent the free exercise rights accommodated by the exemption did in fact exist. It does not seem possible—without wholly abdicating the judicial review function—to hold the accommodation a valid secular legislative purpose for the exemption except on the basis of an independent judicial determination that free exercise rights justifying the accommodation did in fact exist.

Certainly it cannot be the case that merely by asserting such a legislative purpose in litigation the state is entitled to have its legislature's accommodation to assumed free exercise rights confirmed by the courts without any judicial inquiry into the validity of the assumption. The requirements of judicial deference to legislative recognition of constitutional rights cannot be thought to run that far. *See, e.g., Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 193, 66 L.Ed.2d 199 (1980) (judicial inquiry must go back of state's testimonial avowal of secular purpose); *Abington School District v. Schempp*, 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844 (1963) (same); *Karen B.-v. Treen*, 653 F.2d 897, 900 (5th Cir. 1981), *aff'd*, 455 U.S. 913, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1982) (same). On such a veiw of things, any persons successful in pressing free exercise (or establishment clause) claims upon a legislature would have the legislature's action yielding to their claims—no matter how unfounded—effectively immunized from constitu-

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were *arguably* under free exercise protection, the state might permissibly accommodate them as a matter of allowing "play in the joints productive of a benevolent neutrality." *Walz*, 397 U.S. at 669, 90 S.Ct. at 1412.

tional challenge by persons pressing conflicting judicial claims under the other religion clause (or other constitutional provisions).

Because we cannot accept this, we disagree with the district court in its expressed view—critical to its decision—that whether the pre-exemption regulations violated the free exercise clause was not in issue in this case. We think it was inescapably put in issue by the state's deliberate reliance upon the actuality or possibility of free exercise violation as the justifying secular purpose for the legislative exemption.

Because it is inescapably in issue, and because its resolution is, we believe, dispositive, we must address it.[9] But when we turn to that issue, we face—as did the district court—a disturbingly meager record upon which to apply free exercise doctrine as shaped by authoritative Supreme Court interpretations (or "noninterpretations") of the clause.

To point up the record deficiencies it is necessary briefly to summarize the relevant free exercise that would have determined, in a head-on adversarial clash between sectarian centers and the state, whether and to what extent free exercise rights were actually burdened, or even threatened with burden, by the state's pre-exemption regulatory scheme.

We start with the fundamental proposition that the freedom to act upon religious beliefs—to engage in re-

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[9] Because we find the "secular purpose" prong of the *Lemon v. Kurtzman* inquiry not met, we do not reach the primary secular effect and non-entanglement prongs. We observe only that the primary effect of the exemption is obviously the very effect concededly "purposed" by the legislature: to favor religion over nonreligion because of an asserted concern that the accommodation to religion was constitutionally compelled or permitted. The critical inquiry then is whether the asserted "purpose"—directly effectuated—was "clearly secular." If it was not, its primary effect could not be considered secular.

ligious activity—is not absolute, as is the right to hold those beliefs; activity may be curtailed in some circumstances for the protection of sufficiently compelling societal interests. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). Whether state law impinges at all upon free exercise rights first depends upon whether "the purpose or effect of [the] law is to impede the observance of . . . religion[]." *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963). Whether, in turn, the holding or active expression of particular beliefs involves the observance of "religion" depends upon the sincerity of the beliefs held and the centrality of those beliefs to an identifiable religious faith or commitment; only those laws that impede the holding or active expression of sufficiently sincere and central religious beliefs impinge upon free exercise rights. *See Wisconsin v. Yoder*, 406 U.S. 205, 215-19, 92 S.Ct. 1526, 1533-35, 32 L.Ed.2d 15 (1972). If, under these tests, a particular law does impede "religious" activity, even indirectly, it violates the free exercise clause, unless the impediment is justified by a compelling state interest arising from some substantial threat to public health, safety, peace, or order, *see Yoder*, 406 U.S. at 221-29, 92 S.Ct. at 1536-40; *Sherbert*, 374 U.S. at 403, 83 S.Ct. at 1793, and is the least restrictive means for protecting the compelling state interest, *id.* at 406, 83 S.Ct. at 1795.

Where free exercise rights, as measured by these tests, exist, the state is constitutionally obligated to accommodate them, even if this entails some degree of disparate treatment of religious activity; by definition, constitutionally compelled accommodation of free exercise rights cannot abridge the establishment clause. *Yoder*, 406 U.S. 235 n. 22, 92 S.Ct. at 1543 n. 22; *Sherbert*, 374 U.S. at 409, 83 S.Ct. at 1796. And, indeed, to provide the necessary "play in the joints productive of a benevolent neutrality," *Walz v. Tax Commission*, 397 U.S. 664, 90

S.Ct. 1409, 25 L.Ed.2d 697 (1969), the range of permissible state accommodation to free exercise rights runs beyond that constitutionally compelled—out to limits ultimately imposed by the establishment clause. *Id.* at 673, 90 S.Ct. at 1413. Where those limits of permissible accommodation lie in a particular case involves a "value judgment" guided only by historical inquiry and prior authoritative judicial decisions. *Id.* at 669, 90 S.Ct. at 1411.

All this being so, we cannot question the appropriateness of the state's seeking to defend the challenged exemption here on the basis that the accommodation it makes to the activities of "religious institutions" was constitutionally compelled or at least constitutionally permitted by reason of the existence of free exercise rights in those institutions, and that this provided a saving "secular purpose" for the exemption under establishment clause challenge. Protection of constitutional rights can properly be advanced by government as justification for governmental action that is under challenge for violation of other constitutional rights. *See Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (protection of establishment clause rights recognized, though rejected on merits, as cognizable "compelling state interest" defense to free speech challenge). We do not suppose that a court in which such a justification issue is raised is without power to adjudicate it notwithstanding the absence as parties of those persons in behalf of whose free exercise rights the legislative accommodation was allegedly made. *See* Fed.R.Civ.P. 19(b) (criteria for "indispensability" of parties). It is obvious, on the other hand, that fair and complete disposition of the difficult religion clause issues raised in this case would have been greatly aided by the presence of those persons as parties. *See* Fed.R.Civ.P. 19(a) (criteria for "conditionally necessary" parties). A moment's reflection and a summary review of the evidence marshaled for the court by the

parties on their cross-motions for summary judgment will make this plain.

The plaintiffs had to do no more than hold up the challenged exemption for judicial scrutiny to demonstrate its palpable facial non-neutrality in respect of religion; the exempted activities are, by definition, only those of "religious institutions" and the substantiality of the degree of favor conferred upon religion in relation to nonreligion is equally palpable.[10] This clearly distinguished the challenge in this case from those in cases such as *Mueller v. Allen*, —— U.S. ——, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), and *Walz*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed. 2d 697 (1969), where the establishment clause challenges

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[10] To emphasize the substantiality of the relative favor shown religious institutions by this exemption, we summarize the post-exemption situations of the sectarian and nonsectarian child care centers in relation to the state's regulatory scheme.

The only substantive requirements imposed equally on the two classes of centers under the total scheme are that both must, of course, continue to comply with all otherwise applicable general laws and regulations regarding food service activities, health and sanitation, water supply, and building and fire codes (a compulsion clearly present outside and independently of this regulatory scheme); and meet the same minimum staff-child ratios (the only equally applicable standard integral to the post-exemption regulatory scheme).

Beyond this, the nonsectarian centers alone must comply with a substantial range of other requirements: *inter alia*, to serve meals to their patrons and meet certain nutritional criteria; to supply cots and cribs for the children's rest periods; to provide individual storage space for the personal effects of each child; to meet minimum space requirements, with the square-foot-per-child requirement differing for eating, play and sleeping areas; to maintain *two* staff people on duty at all times (while the sectarian centers can at times have only one); to meet administrative and organizational requirements including personnel qualifications in several respects; to keep records on each child; to provide first aid kits and separate isolation rooms for sick children; and to maintain liability insurance at a certain level and to comply with program guidelines, including certain restrictions on disciplinary practices.

were to legislation that on its face equally favored both nonsectarian and sectarian interests, the claim being that it was nevertheless impermissible under the Establishment Clause so to favor the sectarian interests. Importantly, in each of those cases the secular purpose advanced as justification for the legislation applied broadly and equally to nonsectarian as well as sectarian interests and had to do with the intrinsic value, from society's viewpoint, of the religiously neutral conduct being encouraged, aided, or relieved of burden by the legislation. *See Mueller*, —— U.S. at ——, 103 S.Ct. at 3066 (aid to elementary and secondary education); *Walz*, 397 U.S. at 672, 90 S.Ct. at 1413 ("moral or mental improvement of community at large"). It is this very breadth of coverage and focus upon societal values not peculiarily the domain of religion that has allowed the Supreme Court in those cases to find the animating purpose of the legislation to be "secular," and the legislation to be "benevolently neutral" both in purpose and in nonentangling primary effect. *See Mueller*, —— U.S. at ——, 103 S.Ct. at 3067 (upholding tax deduction "assuring the continued financial health of private schools, both sectarian and nonsectarian"); *Walz*, 397 U.S. at 673, 90 S.Ct. at 1413 (upholding tax exemption to all "houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations").

By contrast, the challenged exemption here is expressly designed only to benefit "religious institutions," and the legislative purpose avowed for it has expressly to do only with religious values. It is for this reason, of course, that the state has perforce here rested its claim of justification—of secular purpose—solely on the existence of free exercise rights, identifying the protection of those indisputably religious interests as the "secular" purpose of the exemption.

On the parties' cross-motions for summary judgment, we therefore hold that the state had the burden of dem-

onstrating the existence, as a matter of law, of free exercise rights justifying the exemption on this basis. If it failed to carry that burden, it could not properly be awarded summary judgment, *see* Fed.R.Civ.P. 56(c), though its failure to do so need not on the other hand compel judgment for the plaintiffs on their cross-motion —a matter to which we will return.

This burden could only be carried by a demonstration beyond factual dispute that the previously regulated but now exempted activities expressed sufficiently central and sincerely held religious beliefs to permit the full sweep of free exercise protections provided by the exemption. While, as noted, evidence to this effect might best have come from persons directly claiming the free exercise rights—as in free exercise litigation it typically has come —it of course lay with the state as defendant to marshal the requisite evidence from whatever sources it chose, including the testimony of exempted institutions or any favorable evidence marshaled by plaintiffs, or indeed to contend that free exercise rights were manifest as a matter of law in the very nature of the exempted activities.

But when we look to the totality of the evidence marshaled and to the activities exempted from former regulation, it simply cannot be held that this burden was carried. In the first place it could not be thought carried on the basis that *all* activities, or at least all "good works" activities, of concededly religious institutions, are *per se* "religious," hence entitled to free exercise protections. This simply is not the law.[11] *See Walz*, 397 U.S. at 674, 90 S.Ct. at 1414. The rule instead is that some activities of undoubtedly "religious" institutions may fall completely outside the realm of protected "religion," notwithstanding their undoubted legitimacy or manifest

[11] Indeed, it seems likely that the exempted religious institutions here would make no such ultimate claim in view of their failure, so far as we are aware, to challenge the few remaining areas of modest state regulation to which they are subjected.

social virtue, *see, e.g., De La Salle Institute v. United States*, 195 F.Supp. 891 (N.D.Cal.1961) (operation of winery). Neither, obviously, does the whole sweep of exempt activities here lie so manifestly at the core of religious practices—such as prayer, worship, and ritual —as to be entitled *per se* to protection.

These possibilities aside, the existence of free exercise rights justifying the full sweep of legislative protection afforded by the exemption here could only have been demonstrated by evidence—historical, ecclesiastical, and other —that sufficiently related the particular activities exempted to sincerely and centrally held religious beliefs of the sectarian sponsors of child care centers.

The record is simply devoid of evidence from which any such specific relationship between beliefs and conduct could have been found to exist across the range of the now-exempted activities.[12] Indeed, the state was content to present evidence that tended merely to demonstrate the impetus for the legislature's action upon an avowed secular purpose to accommodate.[13] That evidence simply did

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[12] The most directly pertinent evidence respecting any such relationship in fact tends to negate any relationship. An affidavit of the Director of the Licensing Division of the Department of Welfare stated that in a conference with an attorney for church sponsored centers the attorney "stated that requiring a license as a condition for operating a child care center interfered with the church's ministry, [but] he did not contend that any particular provision of the licensing standards conflicted with the center's free exercise of its religious beliefs." J.A. 153.

[13] The principal evidence of legislative purpose offered by the state was an affidavit of the defendant Commissioner of Welfare which asserted that a number of the church operated centers had opined to him that "the requirement of licensure of their respective facilities and programs . . . was a violation of their rights guaranteed by the First Amendment" and that these complaints prompted a state legislator to introduce legislation "on behalf of these churches to exempt them from licensure requirements." J.A. 131.

not go at all to the underlying issue respecting the existence of protectible free exercise rights, except to the extent of showing that some persons had asserted their existence.[14]

Not only was the evidence insufficient to demonstrate the existence of free exercise rights across the entire range of exempted activities, it actually demonstrated the converse—that some at least of the exempted activities were not entitled as a matter of law to free exercise protections. For purposes of our review it suffices to identify only the most obvious. On no possible view could the requirement that child care centers contain a minimum

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[14] Indeed, even if the true issue were only whether the legislature acted on a justifiable assumption that free exercise rights *arguably* required accommodation to the degree made (the issue perhaps identified as dispositive by the district court, *see* Part I, *supra*), the evidence on that point was by no means undisputed. Against the state's mere evidence that complaints made by churches had prompted introduction of the exemption legislation, the plaintiffs offered evidence that the state's attorney general had rendered an official opinion at the legislature's request to the effect that the pre-exemption regulations violated no rights under the free exercise or establishment clauses. That opinion, given before the exemption's enactment, read, in pertinent part:

> The Welfare Department's child-care center standards are reasonable and permissible regulations to protect the health, welfare and safety of enrolled children. They do not violate First Amendment rights and are enforceable against centers operated by religious institutions. The regulations are consistent with a valid governmental purpose. After applying the tests for determining possible violations of the Establishment Clause or the Free Exercise Clause, I have found no instance of an impact on religious belief and practice such as to negate these regulations of general application.

Of course, as we have indicated, we do not think that the dispositive issue on the summary judgment motion was simply whether, as the state now seems to assert, and the district court seems to have ruled, the legislature acted in a good faith belief that it could permissibly act as it did in order to avoid a possibility of violating such free exercise rights as might exist and, in any event, to avoid litigation asserting those rights.

area of space per child, that they provide suitably spaced and covered cots and cribs, and that they provide nutritious meals, be held to impinge upon any currently known or practiced religious beliefs under free exercise protection. At least these areas of conduct (and arguably many of the other areas formerly subject to general regulation but now exempted from regulation in the sectarian center operations) are manifestly and properly concerned only with the health, safety and welfare of the children in the child care centers.

This being so, it is not necessary to decide whether some of the exempted operations may have been entitled to free exercise protection. On the summary judgment ruling we review, it suffices to hold that the defendant has failed to demonstrate beyond factual dispute that the entire range of exempted operations were so entitled. The exemption, on its face, and as a matter of law was overbroad in relation to the secular legislative purpose claimed for it.[15] *See King's Garden v. FCC*, 498 F.2d

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[15] It is also arguably overbroad in its inclusion of all "religious institutions" in the exempt category. As the record indicates, J.A. 119, and as the *amicus* brief of the Virginia Council of Churches forcefully emphasizes, a significant number of the facially exempted sectarian sponsors have expressly disclaimed any felt entitlement to exemption or any felt burden upon their free exercise rights under the pre-exemption regulations. This attitude was known to the legislature at the time the exemption was under consideration, *id.*, and posed an obvious dilemma for that body. Any attempt to limit the exemption to only those religious institutions that might be expected to challenge the extant regulations would have posed flagrant dangers of facially favoring "one religion over another." The legislature's attempted solution was to exempt all and then give any exempted institution the right nevertheless to opt for licensure and full regulation along with the nonsectarian operators. Va.Code § 63.1-196.3 D. The awkward—if not cruel—Hobson's choice thereby imposed upon sectarian sponsors forced to choose between relinquishment of an unsought but gratuitously conferred competitive advantage over their nonsectarian counterparts and the maintenance of religious and constitutional principles at odds with those of their other sectarian counterparts may well involve still

51, 54-55 (D.C.Cir.), *cert. denied*, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974). The defendant was therefore not entitled to summary judgment. Fed.R.Civ.P. 56(c).

The question then arises whether, as plaintiffs assert, they were entitled to summary judgment on their cross-motion. More precisely, the question is whether upon a summary judgment record demonstrating some degree of overbreadth of the challenged exemption in relation to its avowed secular purpose of accommodating free exercise rights, the plaintiffs are entitled to a summary judgment that, as written, the exemption is unconstitutional.

We believe that such a declaration would technically be warranted here without any necessity on the plaintiffs' part to demonstrate, or on the court's part to determine, the precise extent of overbreadth. That is to say, we do not believe it is incumbent either upon a party challenging such legislation or upon a court entertaining such a challenge to "blue pencil" the legislation in order to square it with the constitutional provision invoked to challenge it. The judicial function in such cases may best be served by a simple declaration that, as they stand, the two do not perfectly square, so that the legislation as it stands must perforce fall. *See United States v. Butler*, 297 U.S. 1, 62, 56 S.Ct. 312, 317, 80 L.Ed. 477 (1936); *see also* W. Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 Fla.L.Rev. 209 (1983) (extolling virtues of limited, procedurally constrained constitutional review). By this means any revision thought needed to square the two is left to the legislature so far as the statute is concerned, or to the people so far

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another basis for constitutional challenge. The potential that this device posed for exacerbation by the state of religious differences among the sectarian operators is obvious, and may well involve quite another set of "entanglement" problems for the exemption as presently structured.

as the Constitution is concerned. And that, in the ordinary case, is arguably where—in faithfulness to separation of powers concerns—the squaring functions should be left or at least first exercised.

But this general principle—even if it be accepted as ordinarily the wise one—has its exceptions. In some situations it may of course be necessary or at least prudent for the courts to do the necessary squaring of statute with Constitution by excising only the unconstitutional portions of legislation not wholly unconstitutional.[16]

That course is indicated as the proper one here. If we declare the exemption unconstitutionally overbroad as written, the likelihood that effective legislative revision without further judicial involvement would occur seems rather remote. The greater—or at least equal—likelihood would seem a belated free exercise challenge by at least some of the exempted "religious institutions"—either to the wholly restored legislative regulatory scheme or to any later revised version that did not make an approximately equal accommodation to that of the exemption successfully challenged here.

As we have indicated at several points, such a direct free exercise challenge by the sectarian institutions would provide a much surer basis than does the present lawsuit for judicial determination of the constitutionally permissible extent of state accommodation. But this would mean two (or more) lawsuits to force a final squaring of the legislative regulatory scheme with the difficult cross-demands of the religion clauses. With the fat already so far in the judicial fire, a better solution to a problem that almost certainly will not go away short of ultimate judicial resolution would be to encourage that resolution in the present lawsuit.

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[16] By this we do not express any opinion as to whether portions of the statutory exemption may be found constitutional upon more complete inquiry. We simply recognize that as a possibility.

This may be done here if the summary adjudication of unconstitutionality for overbreadth that we find justified on the present record is nevertheless conditionally denied, and if the persons whose free exercise rights are centrally in issue in this action are now added as parties to further proceedings in it. Both of these may properly be done under traditional procedures.

Even where summary judgment is appropriate on the record so far made in a case, a court may properly decline, for a variety of reasons, to grant it. *See generally* 10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil* § 2728 (1983). We think this is such a case, for reasons earlier suggested.

A declaration of unconstitutionality for overbreadth would not finally conclude the underlying, conflicting claims of the primary parties in interest in this litigation. Such a declaration would not by its terms, nor could it, preclude subsequent challenges by any of the presently exempted "religious institutions"—nonparties to this litigation—to all or any portions of the restored general regulatory scheme, or any legislatively revised version. Nor could such a declaration prevent a series of piecemeal challenges and counter-challenges by the affected sectarian and nonsectarian institutions to successive legislative attempts to accommodate their conflicting religion clause claims. In other words, summary adjudication on so limited a basis of issue and party preclusion and on so inadequate a factual record, *see Williams v. Howard Johnson's Inc.*, 323 F.2d 102, 105 (4th Cir. 1963), is likely to be inconclusive of the underlying rights in issue, including those of the prevailing plaintiffs.

If, on the other hand, the action is remanded for further evidentiary proceedings with all the most directly affected parties in interest—the nonsectarian and sectarian child care center operators along with the state—those parties can fully develop their opposing

legal and factual positions and a definitive resolution of their conflicting religion clause claims and defenses can be achieved in this litigation. We think the sectarian operators who claim entitlement to free exercise protection should be parties to this action—for reasons already adequately explained. Indeed, they appear, on our analysis of the issues in this case, to be "conditionally necessary" parties under the criteria of Fed.R.Civ.P. 19(a).

Under the circumstances that have developed, however, the decision whether the sectarian operators should at this late stage be made parties should be left to them. If they desire to intervene as a class [17] under Fed.R.Civ.P. 23(b)(3) and if the numerosity and other requirements of the class action rule can be met, they should be permitted to intervene as of right. Fed.R.Civ.P. 24(a)(2). A fair opportunity to intervene can be provided them upon remand. If they decline then to intervene, or if intervention as a class is found infeasible, summary judgment for the plaintiffs should follow, on the basis that the exemption as now written is unconstitutionally overbroad under the establishment clause.

Upon intervention of the sectarian operators as a class, further evidentiary proceedings may be devoted to developing—under applicable substantive doctrine and appropriately allocated burdens of proof, *see* Part II, *supra*—the extent of any free exercise rights had by the sectarian institutions in the exempted activities, and the nature

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[17] We do not believe that the goal of achieving a substantially conclusive resolution of the underlying issues and of concluding all parties in interest can properly be obtained except by means of class intervention. Individual interventions in numbers too small to meet the numerosity requirement, or on the basis of non-common issues too great in number to meet the commonality of issues requirement, would not serve the purpose sought in further proceedings.

Whether the class action criteria are met by those sectarian operators who indicate a desire so to intervene must, of course, be left to the district court.

and extent of any compelling state interest in nevertheless regulating those activities. This will provide a basis —not now provided—for a properly informed "value judgment" by the court of the constitutionally permissible extent, under establishment clause constraints, of the accommodation to free exercise rights made in the challenged exemption.[18]

In developing such a record, the initial burden of production should be upon the sectarian institution intervenors to establish the extent, if any, of their free exercise rights in the exempted activities. If they should fail, under relevant constitutional doctrine, to establish the existence of any such rights, the exemption should be declared wholly unconstitutional. If, however, the intervenors establish the existence of free exercise rights in any of the exempted activities, it should then lie with the plaintiffs to establish the existence of a compelling state interest that nevertheless justified regulation of

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[18] This will concededly involve line-drawing between "religious" and "secular" activities of the sectarian child care center operations that the district court thought were not constitutionally required, either by the legislature or by the court. While we recognize the difficulty, we are persuaded, and hold that the effort must and can reasonably be made. *See generally* Esbeck, *State Regulation of Social Service Ministries of Religious Organizations*, 16 Val.U.L. Rev. 1, 4-11 (1981) (judicial criteria for line-drawing).

Neither that line nor the resulting limit of permissible state accommodation to free exercise rights need—or can—be drawn with bright-line precision. The legislature must in fact be allowed some range of accommodation beyond that constitutionally compelled by free exercise rights. *See* Part II, *supra*. But establishing the permissible range requires for its benchmark a general identification of those activities that are "religious" and those that are not under free exercise doctrine. While, as the district court perceptively put it, the state is not required to "walk[] a tightrope between the establishment clause and the free exercise clause," J.A. 187, it is required, and the courts in judicial review also, to make an informed value judgment that does more than merely placate potential free exercise challengers by granting practically unlimited accommodation in order to avoid any challenge.

those free exercise activities.[19] The court may then proceed to exercise an informed "value judgment" in defining the line of permissible state accommodation—allowing sufficient "free play in the joints"—to any free exercise rights found to have existed.

III

The district court's grant of summary judgment to defendants is vacated. The district court's denial of plaintiffs' cross-motion for summary judgment is affirmed, subject to the condition hereafter expressed. The action is remanded to the district court for further proceedings in accordance with this opinion and the following specific directions.

The district court shall give notice by any practicable means to those religious institutions whose operation of child care centers is exempted from regulation by § 63.1-196.3 of their rights to intervene as a class in this action if so disposed. The notice shall state the general basis for and conditions of the intervention as expressed in this opinion; shall give a reasonable period for exercise of the right to intervene; shall provide that any religious institution notified may file a specific refusal to be in-

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[19] Of course, showing a compelling state interest should lie with the state as well, and an opportunity should be afforded the state to do so. In view of the state's litigation posture to this point, however, the plaintiffs must be allowed to assert the existence of such a compelling state interest, notwithstanding the state's litigation position. The state's interest is obviously that one asserted in the original regulatory design which reached all child care centers equally. The plaintiffs must be free to assert that so long as that interest is asserted through regulation of nonsectarian centers, the same interest must exist as a sufficiently compelling one to justify minimally intrusive regulation even of those sectarian child care operations found sufficiently "religious" to come under free exercise protection, *see* Part II, *supra*; that if the state continues its regulation of non-sectarian center operations, it must, under the establishment clause, comparably regulate the sectarian center operations out to the limits defined by the religion clauses.

cluded in any class certified; and shall indicate that if intervention is declined, summary judgment for the plaintiffs will forthwith be entered declaring the exemption provided by § 63.1-196.3 unconstitutional and of no effect.

Upon request of the court, the defendant shall provide the names and addresses of those institutions considered by the state to be exempted from regulation by § 63.1-196.3. The expense of preparing and delivering the intervention-right notices shall be borne by the defendant as a cost of this litigation.

If class intervention is permitted under the conditions here expressed, the intervenors shall be aligned as additional parties-defendant. So far as practicable, the class shall be defined expressly to exclude any sectarian institution which specifically has declined to be included within the class proposed for intervention.

If, for any reason, class intervention as herein authorized is not consummated, the district court shall forthwith enter judgment declaring Va.Code § 63.1-196.3 unconstitutional, for reasons expressed in the opinion of this court, under the first amendment to the Constitution of the United States.[20]

The costs of this appeal shall be borne by defendants.

SO ORDERED.

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[20] Although plaintiffs prayed additionally for specific injunctive relief compelling the state-defendant to enforce the pre-exemption regulations against all child care center operators, we do not consider that that additional relief is required. We assume that the state will act in compliance with a declaration that the challenged exemption as written is unconstitutional and of no effect.

APPENDIX D

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 80-0116-R

FOREST HILLS EARLY LEARNING CENTER, INC., *et al.*,
Plaintiffs,

v.

WILLIAM L. LUKHARD, etc., *et al.*,
Defendants.

FINAL ORDER

This case comes before the Court on remand from the Court of Appeals for the Fourth Circuit. In accordance with the Court of Appeals' mandate, the Court hereby VACATES its orders of May 15, 1987 and June 22, 1987, declaring Va. Code section 63.1-196.3 unconstitutional and awarding attorneys' fees. JUDGMENT is hereby ENTERED for the defendants, and the case is hereby DISMISSED with prejudice.

It is so ORDERED. Let the Clerk send a copy of this Final Order to all counsel of record.

/s/ Richard L. Williams
RICHARD L. WILLIAMS
United States District Judge

DATE: Aug. 18, 1988

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3713
No. 87-3714

FOREST HILLS EARLY LEARNING CENTER, *et al.*,
Plaintiffs-Appellees,

v.

GRACE BAPTIST CHURCH, *et al.*,
Defendants-Appellants,

COALITION FOR RELIGIOUS FREEDOM, *et al.*,
Amici Curiae,

and

SHENANDOAH BAPTIST CHURCH, *et al.*,
Defendants.

[Filed Aug. 3, 1988]

On Petition for Rehearing and Suggestion for Rehearing In Banc

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The appellees' petition for rehearing and suggestion for rehearing in banc, and a motion for leave to file petition for rehearing out of time, were submitted to this

Court. The motion for leave to file the petition out of time is granted. In a requested poll of the Court, Judges Phillips, Murnaghan, and Ervin voted to rehear the case in banc; Judges Winter, Russell, Widener, Hall, Sprouse, Chapman and Wilkins voted against rehearing the case in banc. As a majority of the judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Senior Judge Butzner, with the concurrence of Russell and Judge Hall.

For the Court

JOHN M. GREACEN
Clerk

APPENDIX F

§ 63.1-196.3. Child-care center operated by religious institution exempt from licensure; annual statement and documentary evidence required; enforcement; injunctive relief.—A. Notwithstanding any other provisions of this chapter, a child-care center operated or conducted under the auspices of a religious institution shall be exempt from licensure as required by § 63.1-196. Such religious institution shall file with the Commissioner of Social Services, prior to beginning any such operation and thereafter annually, a statement of intent to operate a child-care center, certification that the child-care center has disclosed to the parents or guardians of the children in the center the qualifications of the personnel employed therein and documentary evidence that:

1. Such religious institution has tax exempt status as a nonprofit religious institution in accordance with § 501 (c) of the Internal Revenue Code of 1954, as amended, or that the real property owned and exclusively occupied by the religious institution is exempt from local taxation.

2. Within the prior ninety days, the local health department and local fire marshal or Office of the State Fire Marshal whichever is appropriate, have inspected the physical facilities of the child-care center and have determined that the facility is in compliance with applicable laws and regulations with regard to food service activities, health and sanitation, water supply, building codes, the Virginia Fire Safety Regulations or the Uniform Statewide Building Code and local fire requirements.

3. The child-care center employs supervisory personnel according to the following ratio of adults to children:

a. One adult to four children from zero to twenty-four months.

b. One adult to ten children from ages twenty-four months to six years.

c. One adult to twenty-five children ages six years and older.

Each person in a supervisory position shall be certified by a practicing physician to be free from any disability which would prevent him from caring for such children as will be under his supervision.

4. The following aspects of the child-care center's operations are described in a written statement provided to the parents or guardians of the children in the center and made available to the general public: physical facilities, enrollment capacity, food services, health requirements for the staff and public liability insurance.

B. If a religious institution operates a child-care center and does not file the statement and documentary evidence required by subsection A hereof, the Commissioner shall give reasonable notice to such religious institution of the nature of its noncompliance and may thereafter take such action as he determines appropriate, including a suit to enjoin the operation of the child-care center.

C. Any parent or guardian of a child in a child-care center who has reason to believe that a child-care center falling within the provisions of this section is not in compliance with the requirements of subsection A of this section may report the same to the local department of welfare, the local health department or the local fire marshal, each of which may inspect the child-care center for noncompliance, give reasonable notice to the religious institution, and thereafter may take appropriate action as provided by law, including a suit to enjoin the operation of the child-care center.

D. Nothing in this section shall prohibit a child-care center operated by or conducted under the auspices of a religious institution from obtaining a license pursuant to this chapter. (1979, c. 425.)

(3)

FILED
DEC 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-730

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FOREST HILLS EARLY LEARNING CENTER, INC., et al.,
Petitioners,

v.

LARRY D. JACKSON, et al.
Respondents.

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QUESTION PRESENTED

Does a statute that exempts church-affiliated child care centers from compulsory State licensing, which is required of most (but not all) other child care centers, violate the Establishment Clause?

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NO. 88-730

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FOREST HILLS EARLY LEARNING CENTER, INC., et al.,
Petitioners,

v.

LARRY D. JACKSON, et al.
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners' limited discussion of the procedural background is sufficient for purposes of this Petition. From respondents' perspective, however, petitioners have provided an inadequate (and in part inaccurate) statement of the facts.

The issue is whether a State may choose to exempt churches from compulsory civil licensure of their religious ministries without running afoul of the Establishment Clause. That the child care centers are ministries of the respondent churches was stipulated by all parties before trial. Evidence at trial demonstrated that the churches believe sincerely and devoutly that they cannot accept State licensing of their child care ministries without violating their fundamental belief in the Lordship of Jesus Christ. The District Court, which ruled in petitioners' favor (prior to the *Amos* decision, *Corporation of the Presiding Bishop v. Amos*, Nos. 86-179, 86-401,

483 U.S. ____, 107 S. Ct. 2862 (1987)), did not find otherwise.[1] Petitioners likewise do not argue to the contrary; they merely acknowledge (and mis-state) the churches' position and then virtually ignore it.

Petitioners mis-state the churches' position (Petition at 7) for the purpose of setting up a straw man and then attempting to knock it down (Petition at 18 n.4). The churches' objection to compulsory civil licensing of religious ministries is *not* "largely founded on their fear that the state could arbitrarily deny licenses to church-run centers." Petition at 7. It is founded on the fact that a license is a permission granted by a higher authority to a lesser,[2] together with the Biblical instructions, among others, that Jesus Christ is "the head of the church" and that He is "[f]ar above all principality, and power, and might, and dominion, and every name that is named, not only in this world, but also in that which is to come." Ephesians 5:23, 1:21 (KJV). As expressed by one of the churches' pastors at trial, "[t]o acknowledge the lordship of the state, the right to say you can, you cannot exist . . . was then to place the Lord Jesus subject to the state. . . ." The churches also presented an expert witness who testified extensively to the ecclesiastical and historical foundations of their licensure objections, from the teachings of Jesus and the Acts and Epistles of His

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[1] The District Court held the exemption statute unconstitutional because, in its view, exemption is not mandated by the Free Exercise Clause. App. at 20a, 22a-38a. The Court based that ruling on two premises: (1) Contrary to the stipulations of all parties and the churches' uncontradicted testimony at trial, "operation of child care centers by these sectarian institutions is a secular, and not religious, activity," and therefore "requiring a church-run child care center to obtain a license to participate in such a secular activity does not burden the free exercise of religion by that church." App. at 25a, 27a. (2) Assuming that compulsory licensing would burden religious freedom, that burden is justified by a "compelling state interest in protecting the health and safety of children" —a state interest that the State legislature protected by other means, discussed in the text, *infra* — "and is the least restrictive means for protecting this interest." App. at 28a. Petitioners did not defend the first of these points in the Court of Appeals or in this Court, but they continue to argue that the State *may* regulate and therefore that it *must* regulate. *E.g.*, Petition at 12-13, 14, 18-19.

[2] *See* Black's Law Dictionary 829 (5th ed 1979); Webster's Third New International Dictionary 1304 (1961).

Apostles down through the experience of non-Anglican preachers in colonial Virginia who were jailed and otherwise persecuted for their refusals to be licensed to preach by the existing civil-ecclesiastical authorities. The churches' objection is not based on a fear of arbitrary state action, but on a deep conviction that acceptance of civil authority (however benign or tolerant) over the right to conduct a ministry ordained by God would be profoundly sinful.[3]

The so-called exemption statute exempts churches from *licensure*: it does not (as petitioners seem to suggest) relieve the "exempt" centers of all health, safety and welfare regulation. The exemption statue itself requires the exempt centers to demonstrate tax exempt status and compliance with all applicable state and local health department requirements, fire marshal requirements, food service requirements, health and sanitation requirements, water supply requirements, building code requirements, and staff-to-child ratios stated in the statute (which are more stringent than those required by regulation in licensed centers); to provide physicians' certificates for staff; and to provide written disclosures to each parent or guardian and to the general public describing the center's physical facilities, enrollment capacity, food services, staff health requirements, and public liability insurance. The Department of Social Services is authorized to seek an injunction against operation of a center for failure to comply with these requirements. An inspection for non-compliance may be initiated by a complaint from a parent or guardian to a local health department, fire marshal, or department of social services. The churches do not object to the regulatory requirements of the exemption statute, nor to the Department of Social Services' power to enforce the requirements by injunction.

Churches do not have the only statutory exemption from compulsory licensing. Pursuant to other statutory provisions, the State does not license centers run by hospitals for children of their employees, local government centers, or schools for children from two to five years of age at which two to four year olds do not attend more than four hours and five year olds do not attend more than six and one-half hours per day.

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[3] In addition to licensure itself, the churches presented evidence that a number of the State's regulations applicable to licensed centers would violate their freedom to practice their religious beliefs.

ARGUMENT

Summary of Argument. Petitioners argue that this Court should review the decision below "to correct an unwarranted and novel ruling in this important and difficult area of constitutional law. . . ." Petition at 11. The truth is otherwise. The ruling below was neither unwarranted nor novel; it was a correct and straightforward application of this Court's rulings in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Corporation of the Presiding Bishop v. Amos*, Nos. 86-179, 86-401, 483 U.S. ____, 107 S.Ct. 2862 (1987). To present even a plausible basis for this Court's review, petitioners find it necessary to misrepresent the Fourth Circuit's decision; to ignore the record made at trial, the Establishment Clause test stated in *Lemon v. Kurtzman*, and this Court's decision in *Pre-School Owners Association of Illinois v. Illinois*, No. 87-1829, ____ U.S. ____, 108 S.Ct. 2861 (1988); and to neglect ever to argue the issue that actually is presented.

Petitioners argue that the issue in this case has not been "squarely addressed" by this Court. Petition at 3. In the *Pre-School Owners* case, however, a virtually identical statute was challenged on identical grounds. The Illinois statute exempts from licensing and regulation under the State's Child Care Act tax-exempt religious organizations which receive no governmental aid and which operate day care programs primarily to provide religious education. Like the Virginia exemption statute at issue here, the Illinois exemption was separately enacted but is only one of several exemptions from compulsory State licensing and regulation. The appellant Association argued that exemption from licensure and regulatory requirements of day care centers operated by religious institutions violates the Establishment Clause. The Supreme Court of Illinois upheld the statute, relying primarily on *Lemon* and *Amos*, as the Fourth Circuit did in this case. 119 Ill. 2d 268, 518 N.E.2d 1018 (1988). This Court dismissed an appeal for want of a substantial federal question. Thus this Court has "squarely addressed" the Establishment Clause question now presented and held that it was not sufficiently substantial to support its appellate jurisdiction under former 28 U.S.C.

§ 1257(2). Respondents respectfully submit that the same conclusion follows with respect to discretionary jurisdiction under 28 U.S.C. § 1254(1).

The Petition states repeatedly that the Fourth Circuit held the exemption statute valid without ever considering whether failure to enact an exemption would create a burden on the exercise of religion. *E.g.*, Petition at 13. It is difficult to comprehend this mis-reading of the Fourth Circuit's opinion, in which the burden is clearly, if concisely, described: "Absent the exemption, some church leaders would immediately be forced to violate their convictions against submitting aspects of their ministries to state licensing, or face legal action by the state." Appendix to Petition ("App.") at 6a. The Fourth Circuit, quoting *Amos*, noted that "[t]he government interference to be avoided includes both positive statutory mandates to which a religious group would have to conform its practices, and the 'significant burden on a religious organization' caused by forcing it to defend its beliefs and practices in extended free exercise litigation before 'a judge [who may] not understand its religious tenets and sense of mission.' " App. at 6a.

Both concerns are implicated here. As noted above, absence of exemption would lead directly to Church-State confrontations over the churches' conscientious objections to civil licensing. The result would be the "extended free exercise litigation" already conducted in this Establishment Clause case pursuant to the Fourth Circuit's 1984 *Forest Hills II* decision — which petitioners now argue was "simply another way of stating" the *Amos* decision, Petition at 13 — "which permitted the district court to declare that 'while the [churches] may characterize this activity as a part of their ministries, the Court is not bound to accept this characterization,' and to conclude that 'operation of child care centers by these sectarian institutions is a secular, and not religious, activity.' " App. at 7a (quoting opinion below). Manifestly, the exemption "alleviate[s] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at ____, 107 S.Ct. at 2868. *See id.* at ____, 107 S.Ct. at 2871 (Brennan, J., concurring in the judgment): "[d]etermining that certain activities

are in furtherance of an organization's religious mission . . . is thus a means by which a religious community defines itself."[4]

Petitioners attempt to face the real issue, exemption from licensure, only once. Petition at 18 n. 4. They do not address the essential point that requiring the State's permission to conduct a child care ministry would violate the churches' fundamental belief in the supreme Lordship of Jesus Christ. They argue, however, that the discretion of state administrators, limited only by the "arbitrary and capricious" standard applicable to judicial review of administrative acts, provides "sufficient . . . safeguards" for the right to conduct a religious ministry. This plainly is an insufficient basis for overturning the State's legislative action.

Petitioners' witness, the Director of the State's Division of Licensing, testified on cross-examination regarding the kinds of church-state entanglements that would result from compulsory licensing of church child care programs. Perhaps most significantly, she testified that in implementing its requirement that children be taught "positive self-concept" the State would examine a church's teaching of original sin. She explained that "it might depend in great measure on how that was presented," and that "[I]f it were done with a lot of harsh language and fear [or] fatigue, I suppose it would be more concern than if it were done in a loving, caring, and here is an alternative route sort of way." In addition, one church's pastor testified (contrary to the Petition at 17) that during the period when his church accepted a child care license, in the 1970's, a state licensing specialist attempted on at least one occasion to interfere with the church's structured, "Christocentric" pre-school program.[5]

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[4] Justice Brennan's concurrence was limited to nonprofit activities, because the case presented a confrontation between religious freedoms of religious organizations (employers) and individuals (prospective and current employees), and for that reason he sought to limit a "categorical exemption" to "those activities most likely to be religious." 483 U.S. at ____, 107 S.Ct. at 2873. The child care activities at issue here are strictly nonprofit; and this case involves no similar confrontation between opposing interests in religious liberty.

[5] Unlike the District Court, App. at 25a, petitioners do not rely on the fact that two of the respondent churches accepted licenses for a time. Nor could they, in light of testimony that licenses were accepted "in youthful ignorance" and later returned (before enactment of the exemption statute) after prayerful reflection. *See Thomas v. Review Board*, 450 U.S. 707, 715 (1981) ("Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position. . . .")

Beyond dispute, such comprehensive and discriminating official inquiry into religious beliefs and practices is the sort of " 'involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.' " *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 (1987), quoting *Sherbert v. Verner*, 374 U.S. 398, 409 (1963). *See, e.g., Lemon v. Kurtzman*, 403 U.S. at 619-20. "It is not only the conclusions that may be reached by the [State] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusion." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (footnote omitted). *See Amos*, 483 U.S. at ____, 107 S.Ct. at 2868; *id.* at ____, 107 S.Ct. at 2872 (Brennan, J., concurring in the judgment).

The underlying premise of the Petition is that a statute that draws a distinction on the basis of religion — or more specifically, "an exemption which is granted solely on the basis of religion under the Free Exercise Clause" — is presumptively invalid and must be "justif[ied]" by proof that it relieves an actual burden on religious freedom. Petition at 13. That is not the applicable test (although the record amply demonstrates that it is satisfied). Indeed, petitioners' argument represents a radical departure from existing law. It reverses both the *Lemon v. Kurtzman* test and *Amos*' teaching that a statutory religious accommodation is "entitled to deference, not suspicion." 483 U.S. at ____, 107 S.Ct. at 2869. A statutory religious accommodation is not a legal stepchild, presumptively unconstitutional and in need of "justif[ication]." It is valid unless it is shown to violate the Establishment Clause or some other constitutional provision.

Lemon v. Kurtzman, which is virtually ignored in the Petition, states the conventional Establishment Clause analysis:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion."

403 U.S. at 612-13 (citations omitted). The Fourth Circuit correctly applied these tests in this case.

Petitioners implicitly concede that the exemption statute passes the "effect" and "entanglement" tests. The Fourth Circuit's

decision demonstrates that they could scarcely do otherwise. *See* App. at 7a-8a. Petitioners' attack is focused on the "purpose" standard — although that can only be determined by backtracking their argument through the *Amos* decision.

Petitioners begin with the premise that the statute is unconstitutional unless justified, and they argue that it is unjustified because (in their view) it does not exactly fit within the language of the *Amos* opinion. The Fourth Circuit, like this Court in *Amos*, began from the opposite direction, establishing the legislative purpose and determining whether it was "secular," as required by *Lemon*.

In *Amos* the legislative purpose was to alleviate the actual burden on religion that would result from application of Title VII's prohibition of religious discrimination to certain religious institutions. The Court described the burden that was avoided by extending the exemption to all activities of religious organizations: "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. . . . Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." 483 U.S. at ____, 107 S.Ct. at 2868. *See also id.* at ____, 107 S.Ct. at 2871-73 (Brennan J., concurring in the judgment).

The Fourth Circuit likewise addressed the burdens on religious liberty alleviated by the exemption, and it made clear that the exemption fits squarely within the concerns expressed in *Amos*. That point is discussed above. Further addressing legislative purpose, the Court of Appeals pointed out that confrontations over compulsory licensing of religious ministries "would be an unseemly clash of church and state which the legislature might well wish to avoid." App. at 6a. Petitioners attempt to belittle this purpose, arguing that the question is the existence of an actual burden on religious organizations, but they do not and cannot suggest that the legislative purpose is anything other than neutral in the sense of the Establishment Clause.

Gillette v. United States, 401 U.S. 437, 452-53 (1971), provides an apt analogy to the legislative purposes at issue here. In *Gillette* this Court explicated the legislative purposes for draft exemptions granted religious conscientious objectors, as follows:

> There are considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man, . . . but no doubt the section reflects as well the view that "in the forum of conscience, duty to a moral power higher than the state has always been maintained." . . . We have noted that the legislative materials show congressional concern for the hard choice that conscription would impose on conscientious objectors to war, as well as respect for the value of conscientious action and for the principle of supremacy of conscience.
>
> . . . . *The point is that these affirmative purposes are neutral in the sense of the Establishment Clause.* Quite apart from the question whether the Free Exercise Clause might require some sort of exemption, it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience."

Id. at 452-53 (emphasis added; citations and footnotes omitted). Similarly, the statute at issue here was motivated by the desire to "both protect free exercise rights and avoid unnecessary and perhaps bitter conflicts between the Commonwealth and the churches," as stated in an affidavit submitted by the legislative patron of the exemption (which the District Court ordered be made an exhibit after first excluding the patron's testimony, on petitioners' motion, as "irrelevant").

The issue in this case is not, as petitioners argue, whether a State may exempt church child care centers from regulations that are not objectionable on religious grounds. The issue is whether the State may exempt church child care centers from compulsory licensing, which is thoroughly abhorrent on fundamental, well-established, and longstanding religious grounds. The churches are not exempt from regulation, but only from the specific set of regulations imposed incidental to licensing. More to the point, the essential legislative purpose was not to relieve churches from regulations, but to relieve them from licensing. Again, petitioners' focus on the alleged absence of a burden on religious freedom

—which altogether depends on their refusal to acknowledge the issue or discuss the record with respect to licensure — obscures the proper focus on purpose, effect and entanglement under the *Lemon* test.

Objection to civil licensure of religious ministries is part and parcel of the First Amendment itself. As noted above, numerous non-Anglican preachers in colonial Virginia were persecuted for their refusals to obtain licenses to preach. These persecutions, and the reaction to them, were a major factor (and perhaps *the* major factor) leading to enactment of the Religion Clause of the First Amendment. *See, e.g., Everson v. Board of Education*, 330 U.S. 1, 8-13 (1947); *id.* at 33-43 (Rutledge, J. dissenting); H. Miller, The Case for Liberty 14-28 (Chapel Hill, N.C. 1965).

James Madison's great Memorial and Remonstrance Against Religious Assessments, described by Justice Rutledge as "at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion' " (*Everson*, 330 U.S. at 37 (dissenting opinion)), announced principles indistinguishable from those recognized in *Gillette* and underlying the churches' position here:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a savings of his allegiance to the Universal Sovereign.

Appendix to *Everson*, 330 U.S. at 64 (Rutledge, J., dissenting).

CONCLUSION

The Court of Appeals' decision was correct and the issues presented are neither novel nor difficult. The Petition for Certiorari should be denied.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

We have two brief points in reply to the Respondents' opposition to the petition for certiorari.

I.

The state of Virginia and the churches acknowledge in their opposition to the petition for certiorari that the issue before this Court is clear-cut: Does a state's act in requiring a license of church-run child care centers in and of itself burden the free exercise of religion by placing the authority of the state above that of Jesus Christ, thereby immunizing an exemption from licensing from challenge under the Establishment Clause?

If the act of licensing itself does not raise significant free exercise concerns, then, in Justice O'Connor's words, there would be no "identifiable burden *on the exercise of religion* that can be said to be lifted by the government action" in order for the exemption to pass constitutional muster under the Establishment Clause. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, ——U.S. ——, 107 S. Ct. 2862, 2874-75 (1987) (O'Connor, J., concurring) (emphasis in original).[1]

The resolution of this issue will have far-reaching implications. For example, as part of its ministry, a church may be involved in the transportation of parishioners to and from worship service. Should a church now be able to obtain an exemption from licensing church bus drivers because it believes that licensing places the state above the Lordship of Jesus Christ?

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[1] Although Respondents argue that their free exercise rights might be burdened by the application of standards concerning such areas as program content, see Respondents' Brief at 6, there is no evidence that the state ever denied or revoked a license of any center based on such standards, much less that the state has affected the religious nature or content of the program. Constitutional questions should not be decided on hypothetical concerns about the possibility that the state might act in an unconstitutional fashion at some time.

II.

This Court has never addressed the issue of whether the act of licensing an operation of a church said to be part of its ministry, by itself, burdens the free exercise of religion. The churches and state suggest that this issue was addressed in *Pre-School Owners Association of Illinois, Inc. v. Illinois*, —— U.S. ——, 108 S. Ct. 2861 (1988), where this Court dismissed an appeal for want of a federal question. That is incorrect. In *Pre-School Owners*, the exemption was not based solely on religion. The exempt religious child care centers were part of a larger group of centers that were exempted because they were operated as part of an elementary school and were subject to the authority of the State Board of Education. The Illinois Supreme Court upheld the exemption based on the ability of the state to choose one regime of regulation above another. The exemption statute, unlike the Virginia exemption at issue here, did not single out religious organizations for preferential treatment and did not exempt such centers from most regulations. *Pre-School Owners Association of Illinois, Inc. v. The Department of Children and Family Services*, 119 Ill.2d 268, 518 N.E.2d 1018 (1988). Thus, the Court has not addressed the issue of whether the act of licensing sufficiently burdens the churches' free exercise rights so as to support an exemption from generally applicable health, safety and welfare standards under the Establishment Clause.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition, Petitioners respectfully request that the Court grant the petition for a writ of certiorari.

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